TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 355

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

vs.

BERL B. ZOOK AND WILMER K. CRAIG

ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED OCTOBER 16, 1948.

CERTIORARI GRANTED DECEMBER 6, 1948.

SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER

vs.

BERL B. ZOOK AND WILMER K. CRAIG

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA

INDEX

[fol. 1]

IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 61797

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

BERL B. ZOOK AND WILMER K. CRAIG, Defendants

NOTICE OF APPEAL—Filed April 6, 1948

To the Above Named Court and to Urban F. Emme, Clerk Thereof:

Notice is hereby given that Berl B. Zook and Wilmer K. Craig, defendants in the above entitled and numbered action, and each of them, intend to and hereby do appeal to the Superior Court of the State of California, in and for the County of Los Angeles, from that certain Final Judgment of Conviction made and entered in the record of said case on the [24th]* 6th day of [March,]* April, 1948, and from the Order of the above entitled Court denying said defendants' motion in arrest of judgment made and entered in the record of said case on the [24th]* 6th day of [March,]* April, 1948, and from the whole of each thereof.

Dated at Los Angeles, California, this 24th day of March, 1948.

DeWitt Morgan Manning, F. W. Turcotte, By F. W. Turcotte, Attorneys for Defendants, Berl B. Zook and Wilmer K. Craig.

Appeal Bond set at $500.00 each.
WALTERS, Judge.

[fol. 2] [Endorsed:] No. 61797. Received copy of the within Notice of Appeal this 24th day of March, 1948. ——, ——, Attorney for Plaintiff.

[File endorsement omitted.]

* Matter inclosed in brackets struck out in copy.

[fol. 3] IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

COMPLAINT—Filed January 8, 1948

Personally appeared before me, this 8th day of January, 1948, E. W. Hively of Los Angeles City, who, first being duly sworn, complains and says: That on or about the 7th day of January, 1948, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 654.1 of the Penal Code of the State of California was committed by Berl B. Zook and Wilmer K. Craig (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully, at 925 West 7th Street, in the City of Los Angeles, sell, and offer to sell, negotiated, provided and arranged for; and advertised and held themselves out as persons who sell and offer to sell and negotiate, provide and arrange for the transportation of persons on an individual fare basis over the public highways of the State of California by a carrier other than a carrier having a valid and existing certificate of convenience and necessity or other [fol. 4] valid and existing permit from the Public Utilities Commission of the State of California or from the Interstate Commerce Commission of the United States authorizing such holder of a certificate or other permit to provide such transportation of passengers in that the said Berl B. Zook and Wilmer K. Craig, held themselves out as persons willing to sell and negotiate for the above described transportation and sold to James A. Moss and Dorothy Mae Elbag, transportation from Los Angeles to Fort Worth, Texas, over a carrier which was not licensed in any manner by the State of California or the Interstate Commerce Commission to carry passengers for compensation or hire and negotiated for the sale of such transportation and arranged for such transportation.

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefor prays that a warrant may be issued for the arrest of said Defendant ——— (whose true name ——— to affiant is unknown) and that ——— he ——— may be dealt with according to law.

Subscribed and sworn to before me this 8th day of January, 1948, E. W. Hively.
Urban F. Emma, Clerk of the Municipal Court of Los Angeles City, in said County and State. By G. Lander (Seal.) Deputy Clerk.

[fol. 5] [File endorsement omitted]

Issued by Ray L. Chesebro, City Attorney
By Boyd A. Taylor, Deputy City Attorney.

[fol. 6] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 7] IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

No. 61797

DEMURRER TO COMPLAINT—Filed January 22, 1948.

Comes now the defendants, Berl B. Zook and Wilmer K. Craig, and each of them, and demur to the complaint on file herein on the grounds:

I

That it appears upon the face of the complaint that the [fol. 8] Court has no jurisdiction of the offense charged therein in that it is alleged defendants sold and offered for sale, negotiated, provided and arranged for and advertised and held themselves out as persons who sold and offered to sell and negotiate, provide and arrange for the transportation of persons on an individual fare basis over the public highways of the State of California, viz.:
from Los Angeles, California, to Ft. Worth, Texas, over a carrier which was not licensed in any manner by the State of California or the Interstate Commerce Commission to carry passengers for compensation or hire, all of which is interstate commerce and within the exclusive jurisdiction of the federal courts.

II

That it appears upon the face of the complaint that the facts stated do not constitute a public offense against the laws of the State of California in that it is alleged in substance that the transportation offered to be sold and sold

by the defendants was interstate commerce, and hence Section 654.1, California Penal Code, had, and now has, no application.

Wherefore, the defendants, Berl B. Zook and Wilmer K. Craig and each of them, pray that the demurrer be sustained without leave to amend and that a judgment dismissing the action be entered, and that the bail of the defendant, Wilmer K. Craig, be exonerated, and for such other and further [fol. 9] order or orders as to the Court may seem just and equitable.

DeWitt Morgan Manning, F. W. Turcotte, Attorneys for Defendants.

Points and Authorities

Point I

A demurrer to a criminal complaint charging a misdemeanor for reasons that (a) the court has no jurisdiction of the offense charged therein, and (b) that the facts stated do not constitute a public offense, is authorized by statute in this state.

Section 1428.1 and 1461a of the California Penal Code.

Point II

Congress has enacted legislation that covers the field and regulates the same acts charged in the instant complaint.

In 1935 Congress enacted Part II of the Interstate Commerce Act, the pertinent provisions of which are as follows:

"The provisions of this Part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce *and to the procurement of* [fol. 10] and the provision of facilities for such transportation, and the regulation of such transportation, *and of the procurement thereof*, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission." Emphasis supplied. Sec. 302(a) (U. S. C. A. numbering.)

"Nothing in this part, * * * shall be construed to include * * * (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy

declared in this Act, shall the provisions of this part, apply to: * * *; or (9) the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by broker, or by any other person who sells or offers for sale transportation furnished by persons lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part of under a pending application for such [fol. 11] a certificate or permit." Sec. 303(b).

"The term 'interstate commerce' means commerce between any place in a state and any place in another state * * *." Sec. 303(a) (10).

"The term 'Commission' means the Interstate Commerce Commission." Sec. 303(a)(3).

"The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." Sec. 303(a)(16).

"The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for or holds himself or itself out by solicitation, advertisements or otherwise, as one who sells, provides, furnishes, contracts or arranges for such transportation." Sec. 303(a)(18).

"No person shall for compensation, sell or offer for sale transportation *subject to this part* or shall make any contract, agreement or arrangement to provide, procure, furnish or arrange for such transportation, or shall hold himself or itself out by advertisement, solicitation or otherwise, as one who sells, provides, procures, contracts or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: * * *. In the execution of any con- [fol. 12] tract, agreement or arrangement to sell, provide, procure, furnish or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or which is not the lawful holder of an effective

certificate or permit issued as provided in this part: * * *." Sec. 311(a). (Emphasis supplied.)

"Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement or order thereunder * * *, for which a penalty is not otherwise herein provided, shall upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense." Sec. 322(a).

"If any * * * broker operates in violation of any provision of this part * * *, or any rule, regulation, requirement or order thereunder * * *, the Commission or its duly authorized agent may apply to the District Court of the United States for any district where such * * * broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such * * * broker, his or its officers, agents, employees and representatives, from further violation of such pro-
[fol. 13] vision of this part or of such rule, regulation, requirement, order, term or condition, and enjoining upon it or them obedience thereto." Sec. 322(b).

About 1940 the Interstate Commerce Commission, pursuant to the provision of Section 303(b) USCA, instituted an investigation Ex Parte M.C. No. 35, to determine whether or not the exemption of the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business should be removed.

On March 21, 1942, the Interstate Commerce Commission duly made and entered its decision and order in Ex Parte M.C. No. 35, 33 Motor Carrier Cases 69, 3 Fed. Carrier Cases 202, in which decision the Commission, among other things, said:

"Since prior to the passage of Part II of the Act, persons have been traveling between points in the United States under the so-called 'share expense' arrangements in automobiles operated by persons not authorized either by the Commission or State regulatory bodies to transport passen-

gers as motor common or contract carriers. The 'share expense' plan purports to be an arrangement whereby an automobile operator traveling primarily for some purpose other than that of transporting passengers for compensation, carries passengers who share with him the expense [fol. 14] of operation of the vehicle used. Such operators ostensibly engage in such transportation only casually or occasionally or under reciprocal arrangements. In connection with this type of travel, there has developed a business known as that of a travel bureau. Numerous individuals or partnerships operating under trade names, usually including the words 'Travel Bureau,' are engaged in this business whereby, for compensation, they bring together such automobile operators and prospective passengers and arrange, or enable such operators and passengers to arrange for travel in this manner. For this service fees or commissions are collected from either the automobile operator or the passenger and in some cases from both.

"* * *. The travel bureau business is quite extensive in many cities, particularly, those in the western and southwestern states, notable at Kansas City, Mo., Wichita, Kans., Oklahoma City and Tulsa, Okla., Dallas, Ft. Worth, San Antonio, Houston and El Paso, Tex., Los Angeles and San Francisco, Calif., Portland, Oreg., Seattle, Wash., and Denver, Colo. * * *.

"The Commission, Division 5, has held in several proceedings that the partial exemption in Section 203(b)(9) of the act of the casual, occasional and reciprocal transportation of passengers not performed as a regular business has the effect of exempting from all provisions of the act [fol. 15] those who make a business of arranging this type of transportation exclusively, and has denied licenses as brokers to applicants seeking authority to arrange for such transportation.

"* * *. Under the present exemption, the Commission cannot fully regulate such transportation to the end that travelers are adequately protected or require travel bureaus arranging such transportation to provide financial responsibility by filing a bond or other security such as required from brokers arranging for transportation by motor carriers operating under certificates or permits. * * *. We find that in order to carry out the national transportation policy declared in the act, the exemption of casual, occasional or reciprocal transportation of passengers by motor

vehicle in interstate or foreign commerce for compensation as provided in Section 203(b)(9) of the act should be removed to the extent necessary so as to make applicable all provisions of the Act to such transportation when sold, offered for sale, provided, procured, furnished or arranged for by any person who sells, offers for sale, provides, furnishes, contracts or arranges for such transportation for compensation or as a regular occupation or business."

The Interstate Commerce Commission decision and order in Ex Parte M.C. No. 35, supra, had the force and effect of making the transportation of passengers by motor vehicle [fol. 16] in interstate commerce for compensation subject to all provisions of Part II of the Interstate Commerce Act, whenever and wherever such transportation is sold, offered for sale, provided, procured, furnished or arranged for by any person who sells, offers for sale, provides, furnishes, contracts or arranges for such transportation for compensation or as a regular occupation or business.

This order removed the exemption theretofore existing and made all the provisions of Part II of the Interstate Commerce Act applicable to the furnishing of such transportation as that with which we are here concerned.

People v. Van Horn, 76 Cal. App. 2nd, 753, 756.

Point III

Under the Commerce clause of the United States Constitution the Congress of the United States is granted the exclusive power to regulate interstate commerce.

Donnelly v. Southern Pacific Co., 18 Cal. 2d, 863, 867;
Southern Ry. v. Railroad Commission of Indiana, 236 U. S. 439;
Southern Express Co. v. Byers, 240 U. S. 612.

Point IV

The Federal Government has exclusive jurisdiction of the subject matter of this case and therefore the exclusive power to punish.

[fol. 17] Sou. Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439, 445, 446;
People v. Edmondson, Appellate Department Los Angeles Superior Court No. CRA 2160;
People v. Joseph Stephens, Los Angeles Municipal

Court No. 26033, October 3, 1944 (Eugene P. Fay, Judge).

Respectfully submitted, DeWitt Morgan Manning, F. W. Turcotte, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 18] (AFFIDAVIT OF SERVICE BY MAIL—1013A, C. C. P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Clara V. Smith being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 656 S. Los Angeles St., Los Angeles 14, California, that on the 21st day of January, 1948, affiant served the within Demurrer to Complaint on the Plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said plaintiff at the office address of said attorney, as follows: * "Mr. John L. Bland, Deputy City Attorney, 400 City Hall, Los Angeles 12, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed and ** there is a regular communication by mail between the place of mailing and the place so addressed.

[fols. 19-21] Subscribed and sworn to before me this 21st day of January, 1948. Eileen Y. Owens, Clara V. Smith, Notary Public in and for the

---

* Here quote from envelope name and address of addressee.

** When the letter is addressed to a post office other than "Los Angeles" strike out "and"; when addressed to "Los Angeles," strike out "or."

County of Los Angeles, State of California. (Seal.)

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 22] In Municipal Court of City of Los Angeles

[Title omitted]

Transcript of Docket

Jan. 7, 1948

$500 Surety Bond filed as to Craig.

Jan. 8, 1948

Complaint filed sworn to by E. W. Hively charging the Defendants with having on January 7, 1948 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: Violation Section 654.1 Penal Code.

Jan. 8, 1948

Cause called. Judge Louis W. Kaufman presiding. Both parties ready. People represented by Victor Gibborn, Deputy City Attorney. Defendant Craig represented by Paul T. Lewis.

Defendant Craig in court, duly arraigned, informed of the charge against him and of his legal rights. Defendant gives true name as charged.

Cause continued to January 20, 1948, 9:30 A. M. for plea as to Wilmer K. Craig.

[fol. 23] Bail up to stand.

Bert B. Zook not in court for Arraignment. Warrant issued. Bail fixed in the sum of $500 as to Zook.

Jan. 9, 1948

Cause called. Judge Kaufman presiding. Both parties ready. People represented by Victor Gibborn, Deputy City Attorney. Defendant represented by Paul C. Lewis.

Defendant Zook in court duly arraigned, informed of the charge against him and of his legal rights. Defendant

gives true name as charged and asks time to plead. Ordered to appear and plea January 20, 1948 at 9:30 A. M.

Defendant Zook released on his own recognizance. Warrant recalled on Zook.

Jan. 20, 1948

Cause called. Judge Kaufman presiding. Both parties ready. People represented by V. Gibborn, Deputy City Attorney. Defendant in court and represented by F. W. Turcotte.

Cause continued to January 30, 1948, 2 P. M. to file demurrer.

Bail up to stand as to Craig. Defendant Zook released on his own recognizance.

Jan. 22, 1948

Demurrer filed.

Jan. 30, 1948

Cause called. Judge Louis W. Kaufman presiding. Both [fol. 24] parties ready. People represented by John Bland, Deputy City Attorney. Defendants represented by D. W. Manning for Zook, and F. W. Turcotte for Craig.

Hearing on Demurrer. Demurrer overruled.

Defendants each in court, duly arraigned, informed of the charge against him and of his legal rights. Defendants each gives his true name as charged and each enters his plea of not guilty of the offense charged.

Defendants with counsel in open court each personally demands Jury Trial.

Jury Trial set for March 16, 1948 at 9:30 A. M. in Division 7.

Defendants personally waive statutory time for Trial.

Feb. 18, 1948

In the following case Charles W. Lunsford, reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Elmer D. Doyle presiding. Both parties ready. People represented by Ralph Ringwald, Deputy City Attorney. Defendant in court and represented by D. W. Manning.

Cause continued to March 3, 1948, 9:30 A. M. on motion of Attorney for Defendant.

Mar. 3, 1948

In the following case S. T. Trainor, reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Doyle presiding. Both parties [fol. 25] ready. People represented by R. Ringwald, Deputy City Attorney. Defendants in court and represented by D. Manning and F. W. Turcotte.

Defendants with counsel in open court each personally waive Jury Trial.

Transferred to Division 15 for trial.

Mar. 3, 1948

In the following case W. Weigel, reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Walters presiding. Both parties ready. People represented by John Bland, Deputy City Attorney. Defendants in court and represented by D. W. Manning and F. W. Turcotte.

Upon stipulation of all parties cause is submitted.

Defendants adjudged guilty of the offense as charged.

Motion of Defendants in arrest of judgment. Motion argued. Motion submitted.

Defendants waive time of sentence.

Cause continued to March 24, 1948, 10 A. M. Bail up to stand.

Mar. 24, 1948

In the following case Helen Roberts, reporter is ordered to take down proceedings as provided by law.

Cause called. Judge B. J. Walters presiding. Both parties ready. People represented by W. C. Allen, Deputy City Attorney. Defendants in court and represented by [fol. 26] DeWitt H. Manning and F. W. Turcotte.

Motion of Defendants in arrest of judgment.

Cause continued to April 6, 1948, 10 A. M. for further hearing on motion.

Both Defendants personally consent to such continuance.

Apr. 6, 1948

In the following case Robert Doidge, reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Walters presiding. Both parties ready. People represented by P. E. Grey, Deputy City At-

torney. Defendants in court and represented by DeWitt H. Manning.

Motion of Defendants in arrest of judgment. Motion denied.

Defendants waive time of sentence.

Defendants in court and having been duly arraigned for judgment and there being no legal cause why sentence should not be pronounced. Whereupon it is ordered and adjudged by the Court that for the said offense Violation of Section 654.1 Penal Code the said Berl B. Zook and Wilmer K. Craig be fined in the sum of Two Hundred Fifty dollars and that in default of the payment of said fine on or before 5 o'clock P. M. of April 6, 1948 the said Berl B. Zook and Wilmer K. Craig be imprisoned in the City Jail of said Los Angeles city in the proportion of one days imprisonment for each and every 2 dollars of said fines until the said fines be wholly satisfied, not exceeding 125 days, and [fol. 27] that the Defendants be discharged on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed.

Notice on Appeal filed as to each Defendant. Bond on Appeal set at $500 each.

Defendants committed.

Bail ordered exonerated as to Craig.

Apr. 6, 1948

$500 Surety Appeal Bond filed as to each Defendant.

Apr. 8, 1948

Proposed Statement on Appeal filed with affidavit of service by mail.

Apr. 14, 1948

Waiver of time in which to file Amendments to Proposed Statement on Appeal and stipulation for settlement of Statement filed.

Apr. 16, 1948

Judge Byron J. Walters presiding.

Engrossed Statement on Appeal signed, certified and allowed.

Apr. 20, 1948

Files on Appeal transmitted to Appellate Department, Superior Court.

Apr. 28, 1948

Order for Court Reporter to prepare Transcript and payment for same filed.

[fol. 28] May 12, 1948

Reporter's Transcript filed and given to John L. Bland, Deputy City Attorney for reference.

Aug. 3, 1948

Copy of Notice of Intention to Apply to the United States Supreme Court for Writ of Certiorari. Order staying remittitur and execution to October 21, 1948.

Praecipe for record filed.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 29] IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

ENGROSSED STATEMENT ON APPEAL—Filed April 8, 1948

Be It Remembered, that on the 8th day of January, 1948, a complaint was filed in the above entitled court, charging defendants and appellants Berl B. Zook and Wilmer K. Craig with the commission of a misdemeanor, to wit, violation of Section 654.1 of the Penal Code of the State of California. Said violation was alleged to have occurred on or about the 7th day of January, 1948.

Thereafter said defendants demurred to the said complaint upon the grounds that it appears upon the face of the complaint that the court has no jurisdiction of the offense charged therein in that it is alleged defendants sold and offered for sale, negotiated, provided and arranged for and advertised and held themselves out as persons who sold and offered to sell and negotiate, provide and arrange for the transportation of persons on an individual fare basis over the public highways of the State of California, viz., from Los Angeles, California to Fort Worth, Texas, over a carrier which was not licensed in any manner by the State of [fol. 30] California or the Interstate Commerce Commission to carry passengers for compensation or hire, all of which

is interstate commerce and within the exclusive jurisdiction of the federal courts; and upon the further ground that it appears upon the face of the complaint that the facts stated do not constitute a public offense against the laws of the State of California in that it is alleged in substance that the transportation offered to be sold and sold by the defendants was interstate commerce, and hence Section 654.1 of the California Penal Code had, and now has, no application.

Said demurrer thereafter was duly argued in Division 30 of the above entitled court, Honorable Louis W. Kaufman, Judge, presiding, on the 30th day of January, 1948, John L. Bland, Esq., Deputy City Attorney, appearing as counsel for the People, and Messrs. F. W. Turcotte and DeWitt Morgan Manning appearing as counsel for defendants, and thereupon the said demurrer was overruled. The defendants on the said day were duly arraigned, entered a plea of not guilty, and demanded a jury trial. The case was thereupon set down for trial by jury on March 16, 1948. That thereafter, on the 18th day of February, 1948, said defendants by and through their said counsel moved the above entitled court, in Division 7 thereof, to advance the trial of said action to March 3, 1948, which motion was thereupon granted.

Thereafter, on March 3, 1948, the defendants and their [fol. 31.] said counsel appeared in Division 7 of the said above entitled court, together with John L. Bland, Esq., Deputy City Attorney, appearing for the People. That on said day the said matter was assigned to Division 15 of the said Municipal Court, Honorable Byron J. Walters, Judge, presiding, for trial, defendants waiving a jury trial.

Thereupon, on the same date, March 3, 1948, counsel for the People and defendants presented to the court and filed with the Clerk thereof a document entitled Stipulation of Facts, which document is in fact a stipulation of facts entered into by and between the parties to the above entitled matter. That the said Stipulation of Facts, exclusive of the heading and signatures thereon, was as follows:

> "It is agreed by and between the parties hereto, through their respective attorneys, that this cause shall be heard and determined by the above-entitled Court solely on the following agreed statement of facts:
>
> "The defendants, Berl B. Zook and Wilmer K. Craig, were on the 7th day of January, 1948, and for some

time prior thereto had been engaged in the business of making arrangements to provide, procure and furnish transportation for prospective travellers, travelling or desiring to travel from Los Angeles, California, to points in the state of Texas, including Ft. Worth, Texas, via private automobiles operated by casual, [fol. 32] occasional and reciprocal car operators in interstate commerce for compensation, such car operators being persons not engaged in transportation by motor vehicles as a regular occupation or business; that on said 7th day of January, 1948, the defendants, Berl B. Zook and Wilmer E. Craig at 925 West 7th Street, in the City of Los Angeles, County of Los Angeles, State of California, did sell, negotiate, provide and arrange for the transportation of two persons on an individual fare basis by a carrier other than a carrier having a valid and existing certificate of public convenience and necessity or other valid or existing permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission of the United States authorizing such holder of a certificate or other permit to provide such transportation of passengers, said transportation to take place over the public highways of the State of California from Los Angeles, California, to the Arizona state line as a part of an interstate trip, in that said Berl B. Zook and Wilmer K. Craig did on said 7th day of January, 1948, at 925 West 7th Street, Los Angeles, California, hold themselves out as persons willing to sell and negotiate for the furnishing of interstate transportation by such casual, occasional and reciprocal interstate car operator and did sell to James N. Moss and Dorothy Mae Elbag such transportation from Los Angeles to Ft. Worth, [fol. 33] Texas, via a motor carrier which was then and there a casual, occasional and reciprocal interstate car operator and which was not licensed in any manner by either the state of California or the Interstate Commerce Commission to carry passengers for compensation or hire and did negotiate for the sale of such transportation and did arrange for such transportation.

"It is further stipulated and agreed by and between the parties hereto that the defendants were not and neither of them was at any time herein involved holding themselves, or himself, out as persons, or as a person,

who act in making any arrangement to provide, procure, furnish or arrange for transportation between points in the State of California, or in any intrastate commerce."

The court thereupon having duly considered the said statement of facts, the same constituting the only evidence received upon the trial of said action, found both defendants guilty. Thereupon defendants and each of them made a motion in arrest of judgment upon the grounds that there were substantial defects in the complaint in that it appears upon the face thereof that the court has no jurisdiction of the offense charged therein in that it is alleged defendants sold and offered for sale, negotiated, provided and arranged for and advertised and held themselves out as persons who sold and offered to sell and negotiate, provide and arrange for the transportation of persons on an in- [fol. 34] dividual fare basis over the public highways of the State of California, viz.: from Los Angeles, California to Forth Worth, Texas, over a carrier which was not licensed in any manner by the State of California or the Interstate Commerce Commission to carry passengers for compensation or hire, all of which is interstate commerce and within the exclusive jurisdiction of the federal courts; and in that it appears upon the face of the complaint that the facts stated do not constitute a public offense against the laws of the State of California in that it is alleged in substance that the transportation offered to be sold and sold by the defendants was interstate commerce, and hence Section 654.1 of the California Penal Code had, and now has, no application.

The matter was thereon argued by John L. Bland, Esq., Deputy City Attorney, appearing as attorney for plaintiff, and Messrs. F. W. Turcotte and DeWitt Morgan Manning, appearing as attorneys for defendants, and submitted to the court for decision. That thereafter, on the 6th day of April, 1938, the said court made and rendered its decision, denying the said motion of defendants in arrest of judgment upon the ground and for the reason that Section 654.1 of the Penal Code of the State of California did not contravene the Federal Constitution and Federal statutes enacted under the provisions of the commerce clause of the Federal Constitution.

Thereupon, on said day, the court pronounced its judg-
[fol. 35] ment, sentencing each defendant to pay $250.00 fine, or be confined in the County Jail for a period of 125 days. Thereupon, on said 6th day of April, 1948, defendants and each of them filed their written notice of appeal.

Grounds of Appeal

That the court erred as a matter of law in holding that it had jurisdiction of the offense charged in the complaint and in finding defendants and each of them guilty and rendering judgment thereupon, in that it is alleged in the complaint and was proved at the trial that the defendants sold and offered for sale, negotiated, provided and arranged for and advertised and held themselves out as persons who sold and offered to sell and negotiate, provide and arrange for the transportation of persons traveling or desiring to travel from Los Angeles, California to points in the state of Texas, including Fort Worth, Texas, via private automobile operated by a casual, occasional and reciprocal interstate car operator and which was not licensed in any manner by either the state of California or the Interstate Commerce Commission to carry passengers for compensation, all of which is interstate commerce and which offense, if any, is within the exclusive jurisdiction of the Federal courts, and in that the complaint alleged and the facts showed that the transportation offered to be sold and sold by defendants was solely interstate commerce, and hence Section 654.1 of the Penal Code of the State of California attempts to
[fol. 36] punish an act within the exclusive jurisdiction of the Federal courts, the Congress of the United States having fully occupied the field by appropriate legislation under the commerce clause of the Federal Constitution.

Respectfully submitted, F. W. Turcotte and DeWitt Morgan Manning, by DeWitt Morgan Manning, Attorneys for Defendants.

Order Settling Statement on Appeal

The Court does now settle and allow the foregoing Statement on Appeal and certifies that the same is a true and correct statement of the proceedings had in the above entitled action.

Dated: Apr. 15, 1948.

Walters, Judge of the Municipal Court.

AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013a)

STATE OF CALIFORNIA,
County of Los Angeles, ss.

L. Pencil, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action. That affiant's business address is 714 West Olympic Boulevard, Los Angeles, Calif. That affiant served a copy of the attached Appellant's Proposed Statement on Appeal by [fol. 37] placing said copy in an envelope addressed to Messrs. Ray L. Chesebro, Donald M. Redwine and John L. Bland at their office address, which is Room 260 City Hall, Los Angeles 12, California which envelope was then sealed, and postage fully prepaid thereon, and thereafter was on April 7, 1948, deposited in the United States Post Office at Los Angeles, Calif. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

L. Pencil.

Subscribed and sworn to before me this 7th day of April, 1948. Gladys Weber, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 38] IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 2386

Trial Court No. 61797

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent

vs.

BERL B. ZOOK, ET AL., Defendants and Appellants

Appeal by defendants from a judgment and an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge; judgment reversed; appeal from order dismissed.

For Appellant—DeWitt Morgan Manning and F. W. Turcotte.

For respondent—Ray L. Chesebro, City Attorney, Donald M. Redwine, Assistant City Attorney, and John L. Bland, Deputy City Attorney.

OPINION—Filed July 21, 1948

Defendants were convicted on a charge of violating Penal Code section 654.1, and appeal. In brief, that section, added to the Code in 1947, makes it unlawful for any person to sell or offer for sale or to negotiate for sale of, transportation of persons on an individual fare basis over public highways of the state, unless the transportation is to be done by a carrier authorized either by the state Public Utilities Commission or by the Interstate Commerce Commission. The complaint charged a violation of this section by selling [fol. 39] transportation to two persons from Los Angeles to Forth Worth, Texas. After a demurrer had been overruled, the case was submitted to the trial court on a stipulation of facts showing the complaint to be true, and that the transportation was in fact by motor carrier.

The point made on appeal is that the acts charged and proved against defendants were done in interstate commerce and that for that reason and because of certain Federal legislation, the state law cannot be applied to those acts. We find this contention well founded. The Federal legislation in question (Part II, Interstate Commerce Act, U.S.C.A., Title 49, secs. 301-327) is reviewed in *People* v. *Van Horn* (1946), 76 Cal. App. 2d 753, and for details regarding it and the order of the Interstate Commerce Commission which put some of it into effect, we refer to that case. The general effect of the Federal law is that it is unlawful for anyone to sell or offer for sale such transportation by motor carrier as is here in question unless he is licensed as a broker by the Interstate Commerce Commission, or is agent for an authorized carrier, and that the transportation sold shall be done only by a carrier authorized by the Interstate Commerce Commission (U.S.C.A., Title 49, sec. 311(a)).

There is a field of local regulation of interstate commerce which the state may enter, in the absence of action by Congress, and in *California* v. *Thompson* (1941), 313 U. S. 109, [fol. 40] 85 L. ed. 1219, it was held that the particular sub-

ject matter here involved is in that field and that no Congressional action affecting it was then operative. But since that decision, action by the Interstate Commerce Commission has operated to apply the Congressional action to this subject, as was held in *People* v. *Van Horn*, *supra*; and in our own unpublished decision in *People* v. *Edmondson* (1946), L. A. Cr. A. 2160. Since the United States Supreme Court denied certiorari in our case we assume they approved our holding. We now have, therefore, a case where there is Federal legislation occupying the same field as the state law.

Respondent concedes and even demonstrates that under the circumstances of this case the Federal law and section 654.1, Penal Code, forbid and punish the same acts, but contends that this is permissible and does not invalidate the state law, even as applicable to acts in interstate commerce. If we look to the rule in California for determining whether a city ordinance is in conflict with a state law and for that reason void, the city being limited by our Constitution to such police regulations "as do not conflict with general laws," we find it established that "there is a conflict where the ordinance and the general law punish precisely the same acts." (*In re Sic* (1887), 73 Cal. 142, 149; *In re Bell* (1942), 19 Cal. 2d 488, 498; *Pipoly* v. *Benson* (1942), 20 Cal. 2d 366, [fol. 41] 371-4; *In re Portnoy* (1942), 21 Cal. 2d 237, 240; *People* v. *Commons* (1944), 64 Cal. App. 2d (Supp.) 925, 929.) Respondent contends that this is not the rule applicable as between State and Federal legislation, but on review of the authorities we conclude that the rule in interstate commerce matters has substantially the same effect as that above stated. Of such a case, the United States Supreme Court said long ago: "This legislation [enacted by Congress] covers the same ground as the New York Statute, and they cannot co-exist." (*New York* v. *Compagnie Générale Transatlantique* (1883), 107 U. S. 59, 63, 27 L. Ed. 383, 385.) In *Charleston etc. R. Co.* v. *Varnville Furn. Co.* (1915), 237 U. S. 597, 604, 59 L. Ed. 1137, 1140, where it was urged that a state law regarding payment of claims for overcharges of freight was in aid of interstate commerce, the court said: "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition." This quotation was quoted with apparent approval in *Cloverleaf Butter Co.* v. *Patterson* (1942), 315 U.

S. 148, 169, 86 L. ed. 754, 770, and in *Bethlehem Steel Co.* v. *New York Labor Rel. Bd.* (1947), 330 U. S. 767, 775, 91 L. ed. 1234, 1247. In *Pennsylvania R. Co.* v. *Public Service Comm.* (1919), 250 U. S. 566, 569, 63 L. ed. 1142, 1145, the court said: "But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states no more can supplement its [fol. 42] requirements than they can annul them." Again in *Missouri P. R. Co.* v. *Porter* (1927), 273 U. S. 341, 346, 71 L. ed. 672, 675, the court said, referring to the power of Congress over interstate commerce: "Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." In *Oregon-Washington R. & Nav. Co.* v. *Washington* (1926), 270 U. S. 87, 101, 70 L. ed. 482, 488, the court said of such local regulations as we have here: "the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action." In *Northern Pac. R. Co.* v. *Washington* (1912), 222 U. S. 370, 378, 56 L. ed. 237, 239, the court held that an act of Congress regulating hours of labor in interstate railway transportation, even through it was not to take effect until a year after its passage, prevented the state from enforcing similar regulations in the meantime, saying: ". . . as the enactment by Congress of the law in question was an assertion of its powers by the fact alone of such manifestation that subject was at once removed from the sphere of operation of the authority of the state." A similar declaration appears in *People* v. [fol. 43] *Marine Products Co.* (1947), 77 Cal. App. 2d (Supp.) 929, 933.

Against our conclusion already stated respondent cites *United States* v. *Lanza* (1922), 260 U. S. 377, 67 L. ed. 314, *Cross* v. *North Carolina* (1889), 132 U. S. 131, 33 L. ed. 287, and other cases holding that the same act or acts may be an offense against both state and nation and punishable by each. In the Lanza case, the 18th Amendment was involved, which, as the court pointed out, expressly authorized its enforcement concurrently by state and nation. The other

cases do not concern interstate commerce and are sufficiently distinguished in *Southern R. Co.* v. *Railroad Comm.* (1914), 236 U. S. 439, 445, 446, 59 L. ed. 661, 665. There it appeared that the State of Indiana had a statute nearly the same as one passed by Congress, requiring grab irons and hand holds on freight cars and imposing a penalty for violation. A proceeding was brought against the railroad company under the Indiana statute to recover the penalty, but the United States Supreme Court held the statute invalid, after considering the same argument made here. Referring to *Cross* v. *North Carolina*, *supra*, and to the rule declared in it, the court said: "But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction." The court further said: "But the principle that the offender may, for one [fol. 44] act, be prosecuted in two jurisdictions, has no application where one of the governments has exclusive jurisdiction of the subject-matter, and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field, the states could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. But Congress could pass the safety appliance act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and *ipso facto* supersedes existing state legislation on the same subject." The first of these quotations was copied with approval in *United States* v. *Lanza*, *supra*, at 260 U. S. 384, 67 L. ed. 318.

In *State* v. *Harper* (1914), 48 Mont. 456, 138 Pac. 495, 51 L.R.A. (N.S.) 157, 159, the court held invalid a state law substantially like the Mann Act, prohibiting the transportation of women into the state for immoral purposes; and discussing the argument that the same act may be an offense against both the United States and the state, the court said: "This might be true in some instances, but here we [fol. 45] are confronted with the fact that, so far as the

regulation of interstate commerce is concerned, the states have expressly surrendered the entire subject to the general government, and that, when the general government sees fit to exercise the powers delegated and surrendered to it by the states, the state is precluded from saying that the subject, or any matter connected therewith, is under the concurrent control of the two sovereignties."

We conclude, therefore, that section 654.1, Penal Code, cannot be validly applied to transportation in interstate commerce, and since the complaint herein expressly limits itself to such transportation, it states no offense punishable under the section and the demurrer should have been sustained.

The judgment is reversed and the cause remanded to the Municipal Court with directions to sustain the demurrer to the complaint and enter judgment dismissing the action. The appeal from the order in arrest of judgment is dismissed.

Dated July 21, 1948.

Shaw, Presiding Judge.

I concur. Bishop, Judge.

[fol. 46] [File endorsement omitted]

[fol. 47] IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 2386. Trial Court No. 61,797

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

BEEL B. ZOOK, et al., Defendants and Appellants

On Appeal from the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California

JUDGMENT—Filed July 21, 1948

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed and the cause remanded to the Municipal Court with directions to sustain the demurrer to the complaint and enter judgment dismissing the action. The appeal from the order in arrest of judgment is dismissed.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 48] [File endorsement omitted.]

[fol. 49] IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF COUNTY OF LOS ANGELES

[Title omitted]

PETITION FOR REHEARING—Filed July 27, 1948

To the Appellate Department of the Superior Court, County of Los Angeles, State of California:

Comes now the above named plaintiff and respondent and respectfully petitions the Honorable Court to vacate the decision and judgment heretofore rendered in the above entitled cause, and to grant a rehearing thereon.

Such petition is based upon the following grounds:

(1) That the court erred in holding that the Congress had occupied the entire field of regulation.

(2) That the court erred in holding that the State could not punish for acts also punishable under the federal statutes.

(3) That the court erred in holding that the statute trespassed upon the power of Congress.

Argument

As shown by the record, the law affects a transaction wholly occurring in the State of California. The law does [fol. 50] not prevent or in any manner interfere with the transportation of persons in interstate commerce. Neither does it prevent a so-called casual carrier from securing

passengers. Undoubtedly opportunity to utilize the services of persons engaged in selling such transportation facilitates the operation of casual carriers by enabling them to secure a load of passengers more easily or more quickly. The ability to use such agents likewise tends to increase the violation of the federal law by such casual carriers, most of whom were found by the Interstate Commerce Commission to be regularly engaged in the transportation of passengers.

The court relies upon the decision of the District Court of Appeal in People v. Van Horn, 76 Cal. App. (2d) 753; However, it is to be noted that in such decision the court held, that by its own terms the statute in that case provided that it should not be effective if the federal government undertook to regulate such transportation. The decision was primarily based upon the construction of a state statute not involving a federal question. The decision in People v. Edmondson more than implies that such was the effect of the last amendment to the Act.

Certainly such cases cannot be deemed controlling in the case of a statute having no resemblance to the statute involved in those cases.

The court also relies upon an implied approval of its [fol. 51] decision in the Edmondson case by the denial of petition for writ of certiorari by the United States Supreme Court.

In view of the well established rule of the United States Supreme Court that, if a decision is based upon an interpretation of a state law not involving a federal question the court will not consider the federal question, it appears to us that the court in the instant case attaches undue weight to the action of the United States Supreme Court. If our recollection be correct, such court, during the present term, has said that denial of certiorari is not to be considered as approval of the decision of a lower court. Unfortunately, the decision in the instant case was handed down while the writer hereof was on vacation, and it was only by reason of fortuitous circumstances that he returned in time to prepare any petition for rehearing which might be deemed worthy of consideration by the court, and, for that reason he has not had the opportunity to verify his recollection and furnish the court with the citation to the case.

The court has cited a number of cases which, upon careful analysis, are found to be inapplicable to the case at bar.

In Charlestown & Western Carolina R. Co. v. Thornville Furniture Co., 237 U. S. 597, 59 L. Ed. 1132, the court pointed out that the state law was not contrived as an aid to federal policy, but to enforce a state policy differently [fol. 52] conceived. The law involved in the instant action was contrived to aid in the federal policy as well as in a state policy, that is to say, to prevent loss and injury to persons who patronized the so-called travel bureaus. Taking into consideration such language, it follows that what is thereafter said in the decision is directly in conflict with Parker v. Brown, cited in our original brief.

Pennsylvania R. Co. v. Public Service Comm., 250 U. S. 566, 63 L. Ed. 1142, involved the actual movement of trains in interstate commerce. As above pointed out, the California statute does not affect the movement of interstate commerce. The transactions prohibited are all entirely consummated in the State of California. The carrier and also the purchasers of tickets may proceed merrily on their way without any interference by the State.

Missouri Pac. R. Co. v. Porter, 273 U. S. 341, 71 L. Ed. 672, like the Pennsylvania Railroad Company case, supra, directly affected the rights of interstate carriers, in that it required that interstate bills of lading covering goods moving in interstate and foreign commerce carry provisions different from those prescribed by the Interstate Commerce Commission. In other words, the Missouri Pacific case presented a direct conflict between federal and state authority instead of concurring exercise of a common policy.

Probably Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 70 L. Ed. 482, comes closer to the situa- [fol. 53] tion created by the California statute than any of the other cases cited in the opinion of the court. This case is easily distinguishable for the reason that the order involved in that case *prohibited the movement* of interstate commerce into the State of Washington.

At the risk of being charged with unnecessary repetition, we again point out that the California statute does not in any manner interfere with the movement of interstate traffic. Every case cited by the court involved the movement of goods in *lawful interstate commerce*, that is, commerce lawful to engage in under federal law.

We maintain that there is a great difference between a law which has the effect of interfering with the free movement of commerce permitted under federal statute and a law which only incidentally affects interstate commerce in any degree, and such incidental interference is only with unlawful commerce. As was said in *Kelly* v. *Washington*, 302 U. S. 1, 82 L. Ed. 3: "These are not proper subjects of commerce." Such interference conforms with the policy of Congress.

The case of *Bob-Lo Excursion Co.* v. *Michigan*, decided February 2, 1948, — U. S. —, 92 L. Ed. (Adv. Sheets) 339, appears to be much nearer the point than do any of the cases cited in the opinion of the court. Certainly foreign commerce is much more completely subject to the exclusive power of Congress than is commerce between the states. In that case the conviction of a carrier under a state law for [fol. 54] violation of such law in foreign commerce was withheld: The statute involved therein acted directly upon the matter of transportation of persons.

On the contrary the statute in the instant case only incidentally affects interstate commerce. The transactions involved are essentially local in their nature.

We are firmly convinced that the cases cited in our original brief, when considered with the decision in the *Bob-Lo case*, supra, impels the conclusion that the validity of our State statute should be sustained.

We submit that the decision and judgment of the court heretofore rendered be vacated and set aside, and that the court either grant a rehearing in this cause or enter a new judgment sustaining the action of the lower court.

Respectfully submitted, Ray L. Chesebro, City Attorney; Donald M. Redwine, Assistant City Attorney; John L. Bland, Deputy City Attorney, Attorneys for Respondent.

[fol. 55] AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013a)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Dorothy Simpson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of

eighteen years and is not a party to the within and above entitled action; that affiant's business address is 260 City Hall, Los Angeles, California; That on the 27th day of July, 1948, affiant served the within Petition for Rehearing on the appellants in said action by placing a true copy thereof in an envelope addressed to the attorneys of record for said appellants, at the office address of said attorneys, as follows: DeWitt Morgan Manning and F. W. Turcotte, Attorneys at Law, 438 Petroleum Bldg., Los Angeles 15, California and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Postoffice at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication [fol. 56] by mail between the place of mailing and the place so addressed.

Dorothy Simpson.

Subscribed and sworn to before me this 27th day of July, 1948. Kenneth Williams, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[*Title omitted.*]

[fol. 57] In the Appellate Department of the Superior Court of County of Los Angeles

[Title omitted]

Order Denying Rehearing—Filed August 3, 1948

The petition of appellants for a rehearing after judgment of this court on appeal, in the above entitled case, having been filed, and having been duly considered,

Said petition is hereby denied.

Dated August 3, 1948.

By the Court, Shaw, Presiding Judge; Bishop, Judge.

[File endorsement omitted.]

[fol. 58] IN THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES

[Title omitted]

CERTIFICATE OF JUDGE OF TRIAL COURT

I hereby certify that I am one of the judges of the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, and that as judge of said court I heard, considered and decided the questions of law raised by the demurrer of the defendants to the complaint in the above entitled cause.

I further certify that the only question of law raised or argued by the defendants upon the hearing on such demurrer, and the only question of law considered by the court on such demurrer, was the question of whether the section of the Penal Code, under which the prosecution was laid, was invalid by reason of the fact that the act charged to have been committed by the defendants was an act the commission of which was prohibited by federal statute, and that [fol. 59] by reason thereof the State of California is without jurisdiction to enact any statute which prohibited such act or punished the commission thereof, and because such law was applicable to interstate commerce in a field in which the federal government had already legislated by making such act illegal.

I further certify that, in reply to the argument of the defendants, the People of the State of California urged at all times that the State statute was a valid exercise of the police power of the State; that it did not prohibit or interfere with the movement of interstate commerce; that its only effect was to punish an act wholly committed in the State of California; that the effect of such law upon interstate commerce was incidental only; that such effect as there was, was only to prohibit an act which was already prohibited and made penal by the federal law, and that such statute not only did not interfere or conflict with the regulation by Congress of interstate carriers by motor vehicles, but it tended to carry out the policy of Congress by assisting in the suppression of acts and conduct wholly prohibited by federal law.

I further certify that no question of validity of such statute by reason of any provision of the Constitution of

the State of California was urged by the defendants or [fol. 60] considered by the court.

Louis W. Kauffman, Judge.

Attest: W. Otten, Clerk of the Municipal Court, City of Los Angeles, State of California.

[fol. 61] In the Municipal Court of the City of Los Angeles

[Title omitted]

Certificate of Judge of Trial Court

I hereby certify that I am one of the judges of the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, and as judge of said court presided at the trial of the above entitled and numbered cause.

I further certify that at all times during the trial of said action, upon the motion for new trial and motion in arrest of judgment, the defendants urged that the statute under which they were charged was void and unconstitutional upon the sole ground that the statute under which such prosecution was being had was an attempt by the State of California to punish for the commission of an act in interstate commerce, which said act was already prohibited by the federal government and punishable under the provisions [fol. 62] of the federal statute. The People of the State of California, in reply to the claim of the defendants, urged at all times that said State statute constituted a valid exercise of the police power of the State; that the act prohibited by such statute was wholly conceived and completed within the State of California; that such statute did not interfere with the movement of either lawful or unlawful interstate commerce; that any effect upon interstate commerce was wholly coincidental and prohibited only the commission of acts which were also prohibited by federal law, and that such statute did not conflict with any federal law or in any manner interfere with the regulation of interstate commerce by the federal government, but that on the other hand said statute tended to aid and assist in the effectuation of the policy of Congress and the federal government.

I further certify that no question concerning the validity of such statute by reason of the provisions of the Constitution of the State of California was raised by the defendants.

or considered by the court during the trial of said cause, and that the only question of law involved was the federal question hereinbefore stated.

Byron J. Walters, Judge.

Attest: Urban E. Emme, by H. R. Plough, Deputy Clerk. Clerk of the Municipal Court of Los Angeles, California. Aug. 18, 1948.

[fol. 63] In the Appellate Department of the Superior Court of County of Los Angeles

[Title omitted]

Praecipe for Record—Filed August 3, 1948

To the Clerk of the above named Court:

You are hereby requested and instructed to prepare and transmit to the Clerk of the Supreme Court of the United States a full and complete copy of the papers and files constituting the record of the above named court upon the appeal in the the above entitled cause, including the following papers:

1. The complaint.
2. Defendants' demurrer to the complaint.
3. The judgment of the Municipal Court.
4. Statement on Appeal.
5. Notice of Appeal.
6. The docket of the Clerk of the Municipal Court.
7. The Opinion and Order of the Appellate Department of the Superior Court dated July 21, 1948.
8. The respondent's Petition for Rehearing filed July 27, 1948.

[fol. 64] 9. The Order of the court, dated August 3, 1948, Denying Rehearing.

10. Statement of the Trial Court.
11. Copy of Order of the Presiding Judge of the Appellate Department of the Superior Court Staying Proceedings in said cause.
12. This Praecipe.

Ray L. Chesebro, City Attorney, Donald M. Redwine, Assistant City Attorney; John L. Blaisdell, Deputy City Attorney, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 65] In the Appellate Department of the Superior Court of County of Los Angeles

[Title omitted]

Order Staying Remittitur and Execution—Filed August 3, 1948

Upon application of the People of the State of California, respondent in the above entitled cause, by Ray L. Chesebro, City Attorney, Donald M. Redwine, Assistant City Attorney, and John L. Bland, Deputy City Attorney, their counsel, for a stay of remittitur and stay of execution of the judgment of this court, made and entered the 21st day of July, 1948, in said cause, to enable said People of the State of California to apply for and obtain a writ of certiorari from the Supreme Court of the United States,

It Is Hereby Ordered that issuance and transmission of the remittitur of this court, and the order and judgment of this court in the above entitled and numbered action be, and the same is, hereby stayed until October 21, 1948.

Dated this 3rd day of August, 1948.

Shaw, Presiding Judge of the Appellate Department of the Superior Court.

[fol. 66] [File endorsement omitted.]

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] Supreme Court of the United States, October Term, 1948

No. 355

The People of the State of California, Petitioner,

vs.

Bert B. Zook and Walter K. Crane

Order Allowing Certiorari—Filed December 6, 1948

The petition herein for a writ of certiorari to the Superior Court of Los Angeles County, Appellate Department, State of California, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN T

Supreme Court of

OCTOBER T

NOS.

THE PEOPLE OF THE STATE

BERL B. ZOOK and WILMER

Petition for Writ of Certi
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TERM, 1948.

OF CALIFORNIA,

Petitioner,

vs.

R K. CRAIG.

tiorari to the Appellate De-
erior Court of the State of
the County of Los Angeles.
Thereof.

AY L. CHESEBRO,
ONALD M. REDWINE,
HILIP E. GREY,
IEN L. BLAND,
L. Los Angeles 12, California,
ounsel for Petitioner.

ers, Los Angeles. Phone TR. 5206.

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III.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the People of the State of California for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The case presents the question of the validity of a statute of the State of California (California Penal Code, Sec. 654.1) which makes it unlawful to sell in the State of California transportation of passengers by carriers who do not have permits so to act from the Interstate Commerce Commission or from the Public Utilities Commission of the State of California.

In the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California (hereinafter referred to as the Municipal Court), Bert B. Zook and Wilmer K. Craig were charged with the commission of a misdemeanor, to wit, the violation of Section 654.1 of the California Penal Code [R. 2].

Pertinent sections of the Penal Code are printed in an Appendix hereto, at page 23 hereof.

The defendants filed a demurrer to the complaint [R. 3], which came on for hearing before Judge Kaufman of the Municipal Court. The certificate of Judge Kaufman concerning the questions considered on demurrer appears in the record [R. 30]. The demurrer was overruled [R. 11], and the case came on for trial after entry of plea of not guilty by each defendant. The evidence consisted of a written stipulation of facts [R. 15]. The trial court found the defendants guilty [R. 12], after which the defendants made a motion in arrest of judgment [R. 12]. The certificate of the trial judge concerning questions of law considered upon such motion appears in the record [R. 31].

The defendants insisted at all times that the state statute was invalid as constituting a regulation of a phase of interstate commerce which is already covered by federal statute, and the petitioner herein at all times sustained the validity of the statute against such attack and relied upon the federal Constitution and decisions of this court as authority for the statute. Defendants' motion in arrest of judgment was denied [R. 13] and judgment was pronounced against each of the defendants [R. 13]. The defendants filed notice of appeal [R. 1] and a proper statement on appeal [R. 14].

The case was thereafter argued by counsel for the defendants-appellants and for the People, and submitted in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. On July 21, 1948, the Appellate Department reversed the judgment of the Municipal Court, [R. 24] in a decision holding that the statute was invalid because it affected a subject which was regulated by federal law. The opinion of such court appears in the record, commencing at page 19. On July 27, 1948, your petitioner filed its petition for rehearing in the Appellate Department of the Superior Court [R. 25], which petition was denied on August 3, 1948 [R. 29].

Thereafter your petitioner filed notice of its intention to ask certiorari from the United States Supreme Court, and secured a stay of remittitur and execution [R. 33].

Contentions of the Parties.

The defendants, in support of the federal question raised by them, urged that because the Federal Motor Carrier Act provides that any person not a broker licensed by the Interstate Commerce Commission, who sells transportation subject to the provisions of the Interstate Commerce Act (Part II, 49 U. S. C. A., Chapter 8), sometimes hereinafter called the Federal Motor Carrier Act, is subject to punishment for such action, the state cannot also punish him for the commission of such act, even though the state statute does not in any manner conflict with the federal law or interfere with the fulfillment of the policy of Congress.

The basis for the contention of the parties may be best understood by having in mind that the defendants were conducting what is commonly known as a "travel bureau," unlicensed by either federal or state authority, by selling transportation of persons for carriage by unlicensed casual, occasional or reciprocal operators of motor vehicles.

As will be more fully developed hereafter, the carriers who transported persons to whom such transportation was sold were operating in violation of the Federal Motor Carrier Act.

In answer to the contentions of the defendants, your petitioner urged:

(1) That the statute applies to a matter of local concern; that the transactions with which the defendants were charged were fully completed within the State of California, and that the statute affects interstate commerce only indirectly and incidentally.

(2) That the statute does not interfere with interstate commerce inasmuch as, though the carrier was operating in defiance of federal authority, the state made no attempt to prevent or interfere with the transportation of persons to whom tickets were sold, or with the casual, occasional or reciprocal carriers, and that such effect as the law might have upon interstate commerce is purely incidental to the effectuation of a state policy which coincides with the federal policy.

(3) That the statute does not conflict with any federal regulation of carriers and does not prevent or hinder the carrying out of the policy of Congress; on the other hand, it is designed to and does tend to carry out the policy of Congress with respect to the regulation of motor carriers and assist in suppressing activities which constitute violations of federal statutes.

(4) That while the same act may constitute a violation of both state and federal law punishable by each of such jurisdictions, if the act proscribed by the state is essentially local in character, its effect upon interstate commerce will be slight and incidental only. This is particularly true in a case where, as in the case at bar, the act prohibited by state law does not affect in any manner whatsoever interstate commerce or compliance with the federal statute.

In its decision the Appellate Court held that, when Congress has taken the subject matter of legislation in hand, coincidental regulation by the state is as ineffectual as opposition. However, the court failed to give any consideration to the fact that language to that effect appears only in cases in which the coincidence related to the regulation of commerce lawfully conducted under the provisions of federal laws and in which there was either actual or potential conflict in the attempted regulation of commerce lawful in its inception and conduct under federal law. In the instant case the coincidence touches only interstate movements which are unlawful in their inception and prohibited under federal statute.

B.

Basis of Jurisdiction of the United States Supreme Court to Review the Judgment.

1. Statutory Provisions.

The statutory authority believed to sustain the jurisdiction of the Supreme Court of the United States to issue a writ of certiorari in this cause is Judicial Code, Section 237(b), as amended February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937; January 31, 1928, Chap. 14, Sec. 1, 45 Stat. 54, and April 26, 1938, Chap. 440, 45 Stat. 466 (U. S. C. A., Title 28, Sec. 344).

2. The Statute of the State, the Validity of Which Is Involved.

The California statutes, the validity of which was denied by the Appellate Department of the Superior Court, the highest court of such state having jurisdiction of an appeal from the judgment of a municipal court in a misdemeanor action, is Section 654.1 of the California Penal Code, which section was added to the Code by Statutes of 1947 of the State of California, Chapter 1215, page 2723. By the same Act of 1947, two additional sections 654.2 and 654.3, were added to the Code, but their provisions do not affect the validity of Section 654.1 and are not involved in the instant case. However, the entire statute is printed in an Appendix hereto (p. 27).

We summarize the provisions of Section 654.1 of the Penal Code, as follows:

(1) It is declared to be unlawful for any person, corporation, partnership, etc.,

(a) to sell, offer for sale, provide or arrange for, or

(b) to advertise, or hold himself out as one who sells or offers to sell or negotiates, provides or arranges for

(c) transportation of persons on an individual fare basis over the highways of the State of California

(2) unless the transportation sold or offered for sale is to be furnished or provided solely, and such sale is authorized by

(a) a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing permit from

(b) the Public Utilities Commission of the State of California, or

(c) the Interstate Commerce Commission of the United States

(d) authorizing such carrier to engage in the business of carrying passengers.

The effect of the state statute is that, when and if a carrier, be he a casual, occasional or reciprocal carrier or other carrier, secures any kind of valid permit to engage in interstate transportation of persons, the state statute in question ceases to apply to persons who sell transportation by such carrier pursuant to the carrier's authorization, irrespective of whether such seller is licensed as a broker under the federal law.

Although the statute is so broad as to reach individuals who sell only one ticket for transportation by an unauthorized carrier, the validity of the statute, by reason of the facts in evidence by stipulation, is questioned in this case only in so far as the statute applies to persons engaged in the business of selling transportation by unlicensed casual, occasional or reciprocal carriers.

Section 654.2 of the Penal Code sets out certain exceptions to the provisions of Section 654.1 which are not material to the case at bar, and Section 654.3 provides penalties for violation of Section 654.1.

3. Date of Judgment.

The final judgment of the Appellate Department, sought to be reviewed, was rendered on July 21, 1948 [R. 24]. Petition for rehearing was filed on July 27, 1948 [R. 25] and such petition was denied on August 3, 1948 [R. 29]. The decision of the Appellate Department of the Superior Court is a formal opinion which will be published in Advance California Appellate Reports (cited A. C. A.), and in the bound volume of California Appellate Reports which will be cited as ..... Cal. App. 2d (Supp.) ..... It will also be printed in Pacific Reporter, 2d Series. By reason of the fact that at the time this petition is written such opinion had not been printed, we are unable to furnish volume and page where it will be printed, but as such information becomes available it will be supplied to the court. Such opinion is printed in full in the record filed in this court [R. 19].

4. Nature of the Case and Rulings of the Appellate Department of the Superior Court.

I.

Nature of the Case.

This is a criminal prosecution for the commission of a misdemeanor arising out of a violation of a state statute. The action was commenced by the filing of a verified complaint in the Municipal Court of the City of Los Angeles [R. 2], charging the defendants with having sold, offered to sell, negotiated, provided and arranged for the transportation of persons on an individual fare basis over the public highways of the State of California by a carrier other than a carrier having a valid and existing certificate of convenience and necessity, or other permit to provide such transportation, issued by either the Interstate Commerce Commission of the United States or the Public Utilities Commission of the State of California, in that defendants held themselves out as being willing to sell and negotiate for the sale of such transportation to persons named in the complaint for transportation from Los Angeles, California, to Fort Worth, Texas, over a carrier not licensed by either of the above named Commissions to engage in such transportation [R. 2].

In accordance with the provisions of the Penal Code (Secs. 1428.1, 1428.2 and 1428.3) of the State of California, the defendants filed a demurrer to the complaint [R. 3 and 11] which was overruled [R. 11], after which they entered a plea of not guilty [R. 11]. No written

plea was entered for the reason that under the laws of California, pleas in criminal cases are oral (California Penal Code, Sec. 1017).

The cause came on for trial [R. 12] and evidence in the form of a written stipulation of facts was introduced as the only evidence in the case [R. 12 and 15]. Thereafter the defendants were found guilty [R. 12] and, pursuant to the provisions of the California Penal Code, they made a motion in arrest of judgment [R. 12] (Penal Code, Secs. 1428.1 and 1452), which motion was denied [R. 13], after which judgment was pronounced against each of the defendants [R. 13]. The defendants appealed from the judgment by filing a written notice of appeal [R. 1]. The grounds of appeal appear in full in the record [R. 35]. Briefly stated, such grounds were:

That the trial court erred in holding that the act of the defendants in selling transportation by an unlicensed carrier from Los Angeles to Fort Worth was punishable under the state law because such transportation was a transaction in interstate commerce which was within the exclusive jurisdiction of the federal courts, and that Section 654.1 of the California Penal Code attempts to punish an act which is within the exclusive jurisdiction of the federal courts by reason of the fact that Congress had fully occupied the field of possible legislation.

Consequently, the appeal was submitted to the Appellate Department of the Superior Court solely upon a federal question.

II.

Rulings of the Appellate Department of the Superior Court.

In its opinion reversing the order and judgment of the Municipal Court, the Appellate Department of the Superior Court stated that:

(1) Section 654.1 of the California Penal Code forbids the doing of acts the performance of which is forbidden by and punishable under the federal law [R. 21].

(2) When Congress has taken the particular subject matter of legislation in hand, coincidental legislation is as ineffective as conflicting legislation [R. 21].

(3) When Congress has legislated upon a matter of interstate commerce, thereby taking possession of the field, a state may no more supplement such federal legislation than it can annul it [R. 22].

(4) The power of Congress to regulate interstate commerce being supreme, when Congress has exerted its powers of legislation state laws cannot be applied to the subject matter coincidentally with or as complementary to federal enactments *which disclose the intention to enter* a field of legislation within its jurisdiction [R. 22].

It appears plain from the entire decision of the Appellate Department that its decision is based upon the concept that, when and if the federal government *enters* the field of regulation of any phase of interstate commerce, the states may not enact legislation within such field even though such legislation not only does not conflict with the federal law but tends to, and in its operation in fact does, aid in carrying out the policy of Congress.

Your petitioner does not contend that a state law which undertakes to *regulate* the manner of interstate transportation, or any state law which presents either an actual or a potential conflict with or hindrance to the effectuation of congressional policy, would be valid. The sole contention of your petitioner is that a statute of the state which complements the federal law by prohibiting an act local in character, which act is also prohibited by federal law, is not invalid merely by reason of the fact that coincidentally both laws punish the same act. Especially is this true where, as here, the state law is so carefully drawn that it cannot interfere with or otherwise affect the interstate transportation of persons by any carrier authorized by federal law to engage in such occupation.

5. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

I.

The Judgment of the Appellate Department of the Superior Court Is a Final Judgment.

1. The existence of jurisdiction is to be tested by the substantial operation of the judgment.

U. S. v. Thompson, 251 U. S. 407, 412.

2. The judgment finally determines that the defendant is not required to comply with the statute of the state in selling transportation from California to points outside the state.

U. S. v. Oppenheimer, 242 U. S. 85, 88.

3. Upon denying a petition for rehearing the judgment of the Appellate Department becomes final.

California Judicial Council Rules, Appellate Dept. Superior Court, Rule 7 [Appendix, p. 32].

II.

THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IS ONE OF LAST RESORT.

Kim Working v. California (Schneider v. State, Town of Irvington), 308 U. S. 147, 154;
California v. Thompson, 313 U. S. 109;
Unemployment etc. Com. v. St. Francis etc. Ass'n., 58 Cal. App. 2d 271, 277;
Berg v. Traeger, 210 Cal. 323, 325;
People v. Reed, 13 Cal. App. 2d 39, 40.

III.

THE WRIT OF CERTIORARI WILL ISSUE UPON THE PETITION OF A STATE OR ITS AGENCIES WHERE THE CLAIM OF INVALIDITY OF THE STATE STATUTE IS BASED UPON CONFLICT WITH AUTHORITY VESTED IN THE FEDERAL GOVERNMENT AND SUCH CLAIM IS SUSTAINED BY THE STATE COURT.

California v. Thompson, 313 U. S. 109;
State Tax Com. v. Van Cott, 306 U. S. 511, 513;
Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 16, 17;
Minnesota v. Blasius, 290 U. S. 1, 5;
McGoldrick v. Berwind-White etc. Co., 309 U. S. 33;
Coleman v. Miller, 307 U. S. 433;
Ireland v. Woods, 246 U. S. 323, 327, 328.

IV.

THE JUDGMENT OF THE COURT WAS BASED UPON AN ASSERTED CONFLICT OF THE STATE STATUTE WITH A POWER VESTED IN THE FEDERAL GOVERNMENT.

State Tax Com. v. Van Cott, supra, 306 U. S. 511, 514.

V.

SECTION 237 OF THE JUDICIAL CODE MAKES NO DISTINCTION BETWEEN CIVIL AND CRIMINAL CASES IN RESPECT TO THE REVIEW OF THE JUDGMENTS OF STATE COURTS BY THE SUPREME COURT OF THE UNITED STATES.

Twitchell v. Commonwealth of Pennsylvania, 74 U. S. 321, 324.

6. Grounds Upon Which It is Contended the Questions Involved Are Substantial.

I.

If this Honorable Court is unable to say that every question is foreclosed by prior decisions and clearly not debatable, it cannot be said that no question of substance is presented.

Chesebro v. Los Angeles County Flood Control District, 306 U. S. 459, 463;

Hamilton v. University of California, 293 U. S. 245, 258.

II.

Until Congress, under the commerce power, adopts legislation which is inconsistent with the exercise of the police power of the state, a state statute enacted by a state under the reserved police power, which statute appertains primarily to matters of local concern and only indirectly and incidentally affects interstate commerce, will not be held to be invalid.

California v. Thompson, 313 U. S. 109, 115;

Hartford Accident and Indemnity Co. v. Illinois, 298 U. S. 155, 158;

Armour & Co. v. North Dakota, 240 U. S. 510, 517.

III.

Fraudulent or unconscionable conduct of those engaged in selling transportation of persons by casual carriers is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of congressional action.

California v. Thompson, 313 U. S. 109, 115.

IV.

A state regulatory statute is not void as imposing a burden upon interstate commerce where the burden imposed is an inseparable incident of the exercise of legislative authority which, under the federal Constitution, has been left to the states.

Zifrin v. Reeves, 308 U. S. 132, 141;
California v. Thompson, 313 U. S. 109.

V.

In the absence of the exercise of federal authority, and in the light of local exigencies, the state is free to act in order to protect its legitimate interests, even though interstate commerce is directly affected.

Bichholz v. Public Service Commission, 309 U. S. 268, 274;
Kelly v. Washington, 302 U. S. 1, 10.

VI.

In enacting the Federal Motor Carrier Act of 1935 Congress did not intend to supersede state police regulations established for the protection of the public.

H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 85;
Mayer v. Hamilton, 309 U. S. 598, 614.

See also:

South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 189.

VII.

The transportation sold by persons coming within the prohibitions of Section 654.1 of the California Penal Code is for carriage by persons operating as casual, occasional or reciprocal carriers who often have no financial responsibility and are not licensed by any authority to engage in such operations. Prosecution of the carriers will afford no protection to persons who have purchased such transportation and are either "dumped" en route by the carrier or suffer injury or loss by reason of the conduct of the carrier. So far as we can ascertain, with the exception of an abortive effort in Los Angeles to suppress their practices by criminal prosecution in the United States District Court some years ago, no effort to stop their activities has been made by federal officers other than by letter informing such dealers that they might be subjected to prosecution. We can readily see practical reasons why adequate suppression of such dealers cannot be effected under the existing federal law.

The foregoing statement is not to be construed either as a criticism or reflection upon federal authorities charged with the duty of administering the federal statute.

As a practical proposition, in the absence of means whereby local officers operating under state statutes may bring such dealers before the local courts, we can have no protection to the public with respect to the operation of so-called casual carriers. Many of such carriers were found by the Interstate Commerce Commission to be regularly engaged in the business of transporting passengers. (*Ex Parte No. MC 35*, 33 M. C. C. 69).

7. Stage in Proceedings and Method of Raising Federal Questions.

When the defendants were arraigned in the Municipal Court they asked permission to file a demurrer to the complaint. Thereafter, as provided by Sections 1428.1 and 1428.2 of the California Penal Code, they filed a written demurrer [R. 11], which demurrer appears in the record at page 3. In the demurrer the federal question was raised in the following language:

> "That it appears upon the face of the complaint that the facts stated do not constitute a public offense against the laws of the State of California in that it is alleged in substance that the transportation offered to be sold and sold by the defendants was interstate commerce, and hence Section 654.1, California Penal Code, had, and now has, no application."

Such demurrer being overruled after argument by counsel for defendants and counsel for the People, the defendants entered a plea of not guilty and the case came on for trial. After conviction the defendants entered a motion in arrest of judgment [R. 12], as provided by Sections 1428.1 and 1452 of the California Penal Code. Such motion was oral, as permitted under the practice in this state. The federal question was thus again raised in substantially the same form as in the demurrer, as shown by the certificate of the trial judge [R. 31]. After argument by counsel for the defendants and for the People, the position of the prosecution was upheld and the motion was denied [R. 13]. Judgment and sentence was thereafter imposed [R. 13] and defendants appealed to the

Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles [R. 4], and in such court again raised the same federal question in somewhat more detailed form. For the exact language by which the federal question was raised in the Appellate Court, see the record at page 18.

C.

The Questions Presented.

I.

Does the fact that Congress has entered the field of regulation of casual, occasional or reciprocal carriers by motor vehicle prevent the state from enacting a statute which does not undertake to regulate such carriers nor otherwise affect interstate commerce other than as an incident arising out of prohibition of the activities of selling transportation for carriage by carriers other than those having valid permits from constituted authority to engage in such transportation? The effect of the state statute is to prohibit the sale of all transportation over California highways by means of carriers whose operations constitute violations of the Federal Motor Carrier Act. The statute affects intrastate transportation in the same manner and to the same degree, hence no question of discrimination arises.

II.

Is a state statute, regulatory of a local situation only, which does not conflict with or impede the effectuation of the policy of Congress but, on the other hand, aids in such effectuation, void because of the fact that incidentally the state thereby enters a field of legislation previously entered by the federal government?

III.

Did the Appellate Court, in deciding a federal question of consequence, improperly apply various decisions of this court based upon certain factual situations to a question of law in the case at bar arising out of an entirely different situation, thereby deciding a federal question of substance in a manner probably contrary to the applicable decisions of this court?

IV.

Is the transportation of persons by casual, occasional or reciprocal operators of motor vehicles in violation of positive penal laws of the United States, interstate commerce within the intent and meaning of the federal Constitution and federal statutes so as to render the states incompetent to prohibit the sale of transportation to be carried by such unlawfully operating carriers?

D.

The Reasons Relied on for the Allowance of the Writ.

I.

The Appellate Department of the Superior Court has decided a federal question of substance not heretofore decided by this court, and has decided such question in a way which is probably not in accord with the applicable decisions of this court.

II.

The Appellate Department of the Superior Court, in deciding a federal question of substance, erroneously applied language of this court in commerce cases involving the validity of state laws which created an actual or potential conflict with federal authority, to a statute so care-

fully drawn as to preclude the possibility of conflict with federal regulation, which state statute was designed to meet a local condition and to carry out the policy of Congress in a field of regulation in which federal enforcement was proven ineffective.

III.

The Appellate Department of the Superior Court, in deciding a federal question of substance, has disregarded decisions of this court holding that states may enact statutes tending to aid and assist in the effectuation of the policy of Congress.

IV.

The federal question decided by the Appellate Department of the Superior Court is of the utmost importance to every state and to the federal government, as it involves the power of the states to enact laws within the reserved power of the states but which pertain to a field of regulation of commerce in which the Congress has entered, *i. e.*, the Mann Act; interstate transportation of stolen property and other stolen articles; narcotics, Pure Food and Drug Act, etc.

V.

Transportation of persons by unlicensed carriers in violation of positive penal laws of Congress is not interstate commerce within the intent or meaning of the commerce clause of the Constitution, or of laws enacted by Congress regulating interstate commerce so as to prevent the states

from prohibiting the sale of transportation to be carried by carriers thus unlawfully operating.

VI.

In order to protect the public against the evils growing out of the operation of so-called "travel bureaus" selling transportation over unlicensed and irresponsible carriers, it is necessary that the state aid and assist in the carrying out of the congressional policy. To accomplish this it is not only necessary that the aid of local authorities be utilized, but also that the offices of the state courts may be used in order that prompt trial, which at the present time is not available for the trial of minor misdemeanor cases in the United States District Courts, may be had.

If the decision of the Appellate Department of the Superior Court be correct with respect to this state statute, it is obvious that many other state statutes enacted to assist in carrying out federal policies, are likewise invalid. As a matter of constitutional law, the situation presented by a statute of a state so carefully drawn as to assist and not hinder the effectuation of congressional policy, and that presented by a statute of a state which either actually or potentially creates an irreconcilable conflict with such policy, is entirely different.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, commanding that court to certify

and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket: Superior Court No. CR A. 2386, Trial Court No. 61,797, "People of the State of California, plaintiff and respondent, v. Berl B. Zook and Wilmer K. Craig, defendants and appellants"; and that the said judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PEOPLE OF THE STATE OF CALIFORNIA,
By RAY L. CHESEBRO,
DONALD M. REDWINE,
PHILIP E. GREY,
JOHN L. BLAND,
Counsel for Petitioner.

APPENDIX.

To Petition for Writ of Certiorari and Brief in Support Thereof.

Chapter 1215 of Statutes of 1947 of the State of California, page 2723.

An act to repeal "An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof; and repealing an act entitled 'An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof,' approved June 5, 1931, and all acts or parts of acts inconsistent with the provisions of this act," approved May 15, 1933, and to add Sections 654.1, 654.2 and 654.3 to the Penal Code, relating to transportation of persons.

The people of the State of California do enact as follows:

Section 1. The act cited in the title hereof is repealed.

Sec. 2. Section 654.1 is added to the Penal Code, to read:

654.1. It shall be unlawful for any person, acting individually or as an officer or employee of a corporation, or as a member of a copartnership or as a commission agent or employee of another person, firm or corporation, to sell or offer for sale or, to negotiate, provide or arrange for, or to advertise or hold himself out as one who sells or offers for sale or negotiates, provides or arranges for transportation of a person or persons on an individual fare basis over the public highways of the State of Cali-

fornia unless such transportation is to be furnished or provided solely by, and such sale is authorized by, a carrier having a valid and existing permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission of the United States, authorizing the holder of such certificate or permit to provide such transportation.

Sec. 3. Section 654.2 is added to the Penal Code to read:

654.2. The provisions of Section 654.1 of the Penal Code shall not apply to the selling, furnishing or providing of transportation of any person or persons

(1) When no compensation is paid or to be paid, either directly or indirectly, for such transportation;

(2) To the furnishing or providing of transportation to or from work, of employees engaged in farm work on any farm of the State of California;

(3) To the furnishing or providing of transportation to and from work of employees of any nonprofit cooperative association, organized pursuant to any law of the State of California;

(4) To the transportation of persons wholly or substantially within the limits of a single municipality or of contiguous municipalities;

(5) To transportation of persons over a route wholly or partly within a national park or state park where such transportation is sold in conjunction with or as part of a rail trip or trip over a regularly operated motor bus transportation system or line;

(6) To the transportation of passengers by a person who is driving his own vehicle and the transportation of persons other than himself and members of his family

when transporting such persons to or from their place of employment and when the owner of such vehicle is driving to or from his place of employment; provided that arrangements for any such transportation provided under the provisions of this subsection shall be made directly between the owner of such vehicle and the person who uses or intends to use such transportation.

Sec. 4. Section 654.3 is added to the Penal Code, to read:

654.3. Violation of Section 654.1 shall be a misdemeanor, and upon first conviction the punishment shall be a fine of not over two hundred fifty dollars ($250); or imprisonment in jail for not over 90 days, or both such fine and imprisonment. Upon second conviction the punishment shall be imprisonment in jail for not less than 30 days and not more than 180 days. Upon a third or subsequent conviction the punishment shall be confinement in jail for not less than 90 days and not more than one year, and a person suffering three or more convictions shall not be eligible to probation, the provisions of any law to the contrary notwithstanding.

FINDING OF THE INTERSTATE COMMERCE COMMISSION IN EX PARTE NO. MC 35.

Exemption of Casual, Occasional, or Reciprocal Transportation of Passengers by Motor Vehicles.

"We find that, in order to carry out the national transportation policy declared in the act, the exemption of the casual, occasional, or reciprocal transportation of passengers by motor vehicle in interstate or foreign commerce for compensation as provided in section 203 (b) (9) of the act should be removed to the extent necessary and so as to make applicable all provisions of the act to such

transportation, when sold, offered for sale, provided, procured, furnished, or arranged for by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for compensation or as a regular occupation or business." (*Ex parte* No. MC 35, 33 Motor Carrier Cases, 69, at page 81.)

JUDICIAL COUNCIL RULES—APPELLATE DEPARTMENTS, SUPERIOR COURT.

RULE 7. REHEARING AND FINALITY OF JUDGMENT.

(b) (*When judgment becomes final*) Unless a rehearing shall be so ordered, every judgment of an Appellate Department shall become final as follows:

(1) Upon the expiration of 7 days after the same shall have been pronounced, unless one or more petitions for a rehearing shall have been filed within said period of time;

(2) If one or more petitions for a rehearing shall have been filed within said time, then upon the expiration of 30 days after such judgment shall have been pronounced, if such rehearing shall not meanwhile have been granted, or upon the denial of all such petitions if all shall be sooner denied.

(3) Where the judgment is modified before it becomes final, as above provided, the period specified herein begins to run anew, as of the date of modification; but a change of the opinion without modification of the judgment does not postpone the time when the judgment becomes final.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioner respectfully presents this brief in support of its petition for a writ of certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, to review the judgment of that court rendered in the case entitled, "People of the State of California, v. Berl B. Zook and Wilmer K. Craig," being case No. CR A 2386 in the records of such court.

Opinion of the Court Below.

Upon appeal by the defendants Berl B. Zook and Wilmer K. Craig from a judgment of conviction in the Municipal Court of the City of Los Angeles, the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, reversed the judgment of the trial court and, in an opinion, held the statute of the state, for violation of which defendants had

been convicted, to be invalid, and ordered that the complaint be dismissed [R. 24]. Such opinion will be printed in the permanent official California Appellate Reports, and will be cited as ..... Cal. App. 2d (Supp.) ..... By reason of the fact that it is not yet printed, we are unable to furnish at this time volume and page where it will appear. It will also be printed in Advance California Appellate Reports and in the Pacific Reporter, 2nd Series. Such opinion (unless reversed by this court) will be "the law of the case" in any court of Los Angeles County having jurisdiction of misdemeanors in which the validity of Section 654.1 of the California Penal Code is involved, and controlling authority in such courts where similar questions of constitutional law are involved. It will also be cited as controlling authority in all other courts of the State of California wherein are prosecuted misdemeanors involving questions of conflict with federal regulation of interstate commerce. Such opinion is printed in the record filed with this court [R. 19].

Under the practice in California, when a criminal misdemeanor case is remanded with instruction to dismiss the complaint, the only act to be performed in the lower court is the administrative act of entering, upon the order of such court, the formal order of dismissal. Entry of such order of dismissal constitutes a bar to the filing of a new complaint (California Penal Code, Sec. 1387). There remains no further judicial action to be taken in the Municipal Court and the judgment of the Appellate Department of the Superior Court is the final judgment in the case.

Grounds of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344 (b).) The date of the judgment of the Appellate Department of the Superior Court, sought to be reviewed, was July 21, 1948. Thereafter, within the time allowed by the Rules of the Judicial Council of the State of California governing appeals from the Municipal Court to the Appellate Department, petitioner filed its petition for rehearing [R. 25], which petition was duly considered and denied [R. 29].

Statement of the Case.

The defendants in the trial court and appellants in the Appellate Department, Berl B. Zook and Wilmer K. Craig, in a complaint filed in the Municipal Court of the City of Los Angeles, were jointly charged with violation of Section 654.1 of the California Penal Code [R. 2]. Such section, together with related sections, was added to the Penal Code by 1947 Statutes of California, Chapter 1215. Such statute is printed in full in an appendix to our petition for writ of certiorari [p. 27].

The defendants filed their demurrer to such complaint [R. 11] in which the federal question herein discussed was raised. Such demurrer is printed in full in the record [R. 3]. After hearing thereon the demurrer was overruled [R. 11] and the case came on for trial [R. 12]; at which time there was filed a written stipulation of facts [R. 12] which stipulation is printed in the record [R. 15] as part of the statement on appeal. Thereafter both defendants were convicted, after which each made a motion in arrest of judgment [R. 12]. Such motions were denied and judgment was entered against the defendants [R. 13],

from which judgment the defendants appealed to the Appellate Department, in all respects complying with the Rules of the Judicial Council of California governing such appeals.

The case came on for hearing in the Appellate Department of the Superior Court, and after briefs were filed by counsel for appellants and respondent and oral argument heard by the Appellate Court, the case was duly submitted and thereafter decided as hereinbefore stated.

A complete statement of the nature of the case has been made in our petition, hence, in the interests of brevity, we do not repeat it here, save to say that the case involves the power of the state to prohibit and make punishable acts wholly commenced and consummated in the State of California, which acts coincidentally affect interstate commerce, in that, in a matter of local concern and in aid of the policy of Congress, the state prohibits the sale, by persons engaged in such business, of transportation of persons where such persons are to be carried by carriers operating contrary to and in defiance of federal law, and who are subject to criminal prosecution under federal law.

As shown by the certificates of the judges of the Municipal Court [R. 30 and 31], the federal question was raised by defendants and opposed by the People at all times in such court.

The judgment of the Appellate Department is based solely upon its interpretation of certain decisions of this court, and no state question is involved.

Stated in its simplest form, the question is:

Is a state statute upon a matter of local concern only, which is calculated to and does tend to effectuate a policy of Congress, invalid because coincidentally the state, in legislating upon a matter within the reserved power of the state upon such matter of local concern, has included in such legislation matter concerning which Congress has legislated upon, when such state statute

(a) does not hinder or delay the movement of interstate commerce moving, either lawfully or unlawfully, under the federal law;

(b) affects only transactions which are entirely commenced and completed within the state;

(c) affects interstate transportation of persons only indirectly and incidentally, and affects only a phase of such transportation which is unlawful under federal law;

(d) does not present an actual or potential conflict with federal law or congressional policy; and

(e) does not touch interstate commerce except that it punishes for the commission of an act in California which act is also punishable under the federal law?

The only phase of interstate commerce touched by the statute is the carriage by casual, occasional or reciprocal carriers by motor vehicle of passengers to whom transportation is sold by persons engaged in the business of selling such transportation. The state does not undertake to regulate or prohibit the operation of such carriers, though their operation without a certificate of convenience and necessity or a contract carrier's permit, procured from

the Interstate Commerce Commission, is unlawful a punishable under the federal statute.

The state has confined its legislation to a prohibition the conduct of so-called "travel bureaus" which, by sellin to the public transportation over such casual carriers, n only aid and abet such carriers in their violation of th federal statute, but who, as an indirect incident of th order of the Interstate Commerce Commission (*Ex par No. MC 35*, 33 M. C. C. 69) making transportation b casual carriers of persons to whom transportation is sol by persons engaged in selling such transportation subjec to the provisions of the Federal Motor Carrier Act (Inter state Commerce Act, Part II, 49 U. S. C. A., Ch. 8), ar made subject to the provisions of such Act regulating th licensing and conduct of brokers.

The position of your petitioner is that a state statut which regulates a matter within the police power of th state; that affects a matter of local interest only; does no conflict with any federal law; does not stand as an obstac to the accomplishment and execution of the full purpose of Congress; does not constitute any burden whatsoeve upon lawful interstate commerce, and but incidentally o indirectly affects only such interstate commerce as is un lawful in its inception and conduct under the federa statute, does not have such coincidental relation to sul ject matter legislated upon by Congress as to make th state law invalid; and that the Appellate Department mi applied the statements of this court in various cases her inafter discussed where there was either actual or poten tial conflict between the two jurisdictions in the regul tion of commerce lawful under the federal statutes, b applying such cases to a state statute which affected, i directly only, interstate commerce which, under the feder

law, is unlawful in its inception and execution. Furthermore, that a course of conduct carried on in violation of federal laws regulating commerce is not "interstate commerce" within the intent or meaning of the decisions of this court concerning the power of the states to legislate upon matters of interstate commerce.

History of Legislation Involved.

In order to understand the various points discussed in our argument without unduly extending such argument, it is deemed advisable to briefly review the history of legislation and litigation concerning the operation of persons engaged in selling transportation over casual carriers.

In 1933 the legislature of the State of California enacted a statute commonly known as the Motor Carrier Transportation Agent Law (Stats. 1933, Ch. 390), by which the state provided for the licensing of persons who sold transportation of persons over the highways of the state for carriage by persons who were not carriers authorized by the State Railroad Commission or the Interstate Commerce Commission to engage in such business. In various cases in the state courts and in the Federal District Courts the validity of the law as it applies to intrastate transportation was upheld. In 1940 the Appellate Department of the Superior Court held such statute void, in so far as it applied to interstate commerce. Such decision was considered by this court in *California v. Thompson*, 313 U. S. 109, and reversed in 1941. Subsequently, in 1941, the legislature of the State of Cali-

fornia amended Section 2 of the state statute (Calif. Stats. 1941, Ch. 539).

So far as here pertinent, by such section it was provided that "In the absence of action on the part of Congress or the Interstate Commerce Commission regulating or requiring licenses" of motor carrier transportation agents acting as agents for motor carriers operating without licenses from either of the Commissions hereinbefore named, the law would apply to such agents selling interstate transportation by unlicensed carriers. About this same time the Interstate Commerce Commission conducted a hearing with respect to the practices of casual carriers and as a result thereof made an order which provided that, when casual carriers transported persons to whom transportation was sold by persons engaged in selling such transportation, such transportation was removed from the exception in the Federal Motor Carrier Act (Interstate Commerce Act, Sec. 203 (b) (9), 49 U. S. C. A. 303 (b) (9)), and was subject to all the provisions of the Interstate Commerce Act. The text of the order is set out in full in the appendix to our petition in this cause, at page 31.

Subsequent to these two changes, the validity of the California statute as it applied to interstate transportation, was raised in the Municipal Court, and upon appeal to the Appellate Department of the Superior Court (*People v. Edmondson*, Cr. A. 2160), such court sustained the order of the Municipal Court, holding the statute inapplicable to the sale of interstate transportation. Such court based

its decision in the *Edmonson* case upon two grounds: (1) that by reason of the provisions of the state statute, quoted above, upon the making of the order of the Interstate Commerce Commission in *Ex parte* No. MC 35 (33 M. C. C. 69), the state statute became, by virtue of its own limitation, inoperative upon interstate commerce (purely a state question) and (2) that because there was legislation by Congress upon the subject matter the state had no jurisdiction to enforce the state statute against persons selling interstate transportation (a federal question).

The People sought certiorari in such case, which was denied (*People of the State of California v. Edmondson*, 329 U. S. 716.)

Subsequently, the District Court of Appeal of the State of California passed upon the same California Statute and, as did the Appeliate Department of the Superior Court, held that the state statute did not apply to the sale of interstate transportation for two reasons, such reasons being the same as those enunciated by the Appellate Department (*People v. Van Horn*, 76 Cal. App. 2d 753).

The legislature was thus confronted with the fact that two state courts had held that by reason of the 1941 amendment to the Motor Carrier Transportation Agent Law, the law became ineffective upon the action by the Interstate Commerce Commission and by the fact that such courts had also held that any attempt on the part of the state to license such agents to perform acts prohibited by the federal law was beyond the power of the state, and

confronted with the further fact that the federal law notwithstanding, these travel bureaus were operating without interruption, to the loss and injury of members of the public. In order to protect the public, the legislature repealed the statute (Calif. Stats. 1933, Ch. 390) involved in such cases and enacted a statute the enforcement of which would not interfere with the movement of interstate commerce and would not only protect the traveling public of California but would aid in the effectuation of the policy of Congress and the Interstate Commerce Commission to prevent the operation of casual carriers unless and until they should secure permits of some sort authorizing them to engage in the business of transporting persons.

The statute thus enacted, added Sections 654.1, 654.2 and 654.3 to the California Penal Code, of which Section 654.1 is the statutory provision involved in this cause.

Specifications of Error.

The Appellate Department of the Superior Court erred in holding:

1. A statute of the State of California which prohibits the sale of transportation of persons on an individual fare basis, if such transportation is to be provided by persons who are not the holders of a permit of some nature from the Public Utilities Commission of California or the Interstate Commerce Commission authorizing such carrier to engage in such commerce, is invalid as it applies to persons selling interstate transporta-

tion of persons by unlicensed carriers operating in violation of the provisions of the Interstate Commerce Act (Federal Motor Carrier Act).

2. By holding that the rulings of this court in certain cases, based upon the facts before the court in such cases, applied to a case in which the facts and circumstances before the Appellate Department of the Superior Court were in no respect similar to the facts in the cases decided by this court and relied upon by the Appellate Department of the Superior Court as authority.

3. In disregarding and not following the oft-repeated holding of this court that state statutes, enacted under the police power of the state, will not be held to be invalid unless they create a situation which directly and substantially affected interstate commerce, hindered or interfered with the accomplishment of congressional policy or constituted an undue burden upon interstate commerce to such an extent that the state statute cannot be reconciled with federal statutes or federal control, and in holding that the mere fact that the federal government had entered upon a given field of legislation prevented the states from legislating upon such subject matter even though the relation between the state and federal legislation is coincidental.

4. By considering commerce of a class interdicted by Congress to be "interstate commerce" within the meaning of the various decisions of this court relative to the rights of states to legislate concerning interstate commerce.

Summary of the Argument.

I.

THE FEDERAL QUESTION IS SUBSTANTIAL.

II.

THE POLICY OF THIS COURT IS TO PERMIT JURISDICTION OF BOTH STATE AND FEDERAL GOVERNMENTS WHEN TO DO SO DOES NOT RESULT IN CONFLICT OF AUTHORITY.

III.

THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, IN ITS DECISION, HAS APPLIED DECISIONS OF THIS COURT IN A MANNER CONTRARY TO THE MEANING AND EFFECT THEREOF.

IV.

STATE STATUTES, ENACTED UNDER THE RESERVED POLICE POWER, AND APPLICABLE TO LOCAL CONDITIONS ONLY, WHICH DO NOT INTERFERE WITH THE FREE MOVEMENT OF INTERSTATE COMMERCE, ARE NOT VOID SOLELY BY REASON OF THE FACT THAT THEY INDIRECTLY AFFECT IN SOME SLIGHT DEGREE AN INCIDENTAL PHASE OF SUCH COMMERCE.

V.

A STATE MAY PUNISH FOR VIOLATION OF A STATUTE OF THE STATE EVEN THOUGH THE SAME ACT IS ALSO PUNISHABLE UNDER THE PROVISIONS OF A FEDERAL STATUTE.

VI.

COMMERCE CARRIED ON IN VIOLATION OF FEDERAL STATUTES IS NOT IN ITS TRUE SENSE A PROPER SUBJECT OF INTERSTATE COMMERCE, AND SUCH UNLAWFUL COMMERCE IS NOT WITHIN THE LIMITATION IMPOSED UPON THE STATES IN LEGISLATING UPON INTERSTATE COMMERCE.

VII.

CONCLUSION.

ARGUMENT.

I.

The Federal Question Is Substantial.

This court has had before it innumerable cases involving the relative powers of states and Congress to legislate upon the subject of interstate commerce. Such cases may be divided roughly into classes as follows:

1. Cases in which the state undertook to regulate a phase of interstate commerce which, from its nature, was subject only to federal control.

2. Cases in which the state statute imposed an undue burden upon interstate commerce even though no federal legislation was involved.

3. Cases which involved the validity of state laws which were in direct conflict with Acts of Congress.

4. Cases involving state statutes which, in the enforcement thereof, created actual interference with federal regulation or disclosed potential possibilities of conflict of authority.

5. Cases in which the state statute affected matters local in nature, and which only indirectly affected interstate commerce.

6. Cases in which the state statute involved covered a matter not legislated upon by Congress.

The present case presents a question which has never been before this court:

May the state, in legislating upon a matter of local concern and in aid of Congress and the Interstate Commerce Commission in carrying out the policy of entirely suppressing certain forms of interstate transportation by

motor vehicle, enact a law which punishes persons for commission of acts within the state, which acts incidentally touch a phase of interstate commerce by reason of the fact that persons subject to prosecution under the state statute are engaged in the business of selling transportation of persons for carriage by carriers engaged in interstate commerce, in violation of the penal provisions of the federal law?

The Interstate Commerce Commission has found it to be a fact that the operation of such carriers is detrimental to public interest (*Ex parte No. MC 35*, 33 M. C. C. 69), and by its order has made such carriers subject to all the provisions of the Federal Motor Carrier Act. By reason of such order a carrier who desires to transport persons to whom transportation is sold by a "travel bureau" may not lawfully operate until he secures a certificate of convenience and necessity or a contract carrier's permit from the Interstate Commerce Commission, and persons engaged in the business of selling such transportation are acting in violation of the provisions of the Interstate Commerce Act, Part II, Section 211, 49 U. S. C. A., Ch. 8, Sec. 311. Notwithstanding such order, the operation of such carriers continues apace, as does the operation of the "travel bureaus" engaged in selling such transportation. Because of the fact that operations of such bureaus are of a nature that as a practical matter no effective control measures can be adopted by Congress (*California v. Thompson*, 313 U. S. 109), it appears that unless the state, by legislation calculated to carry out the policy of Congress, may assist in stamping out the evil, it must continue unabated. One of the unfortunate features of such operations is that the persons who patronize such ticket agencies generally belong to that class of persons finan-

cially so conditioned that the loss or injury by reason of the acts of irresponsible operators of vehicles is serious though in actual dollars and cents it may not be substantial.

It is not only in this phase of interstate commerce that the question presented is substantial. The Congress, in an attempt to aid the states with respect to suppression of certain criminal activities having situs in two or more states, has enacted numerous laws having as their object assistance to the states in suppression of crimes directly affecting the citizens of the various states. One such law is the so-called federal Mann Act (federal White Slave Act). Although it is inconceivable that Congress intended to hinder the various states in their efforts to suppress prostitution, the Supreme Court of Montana, in *State v. Harper*, 48 Mont. 456 (138 Pac. 495), cited by the Appellate Department of the Superior Court in support of their decision in the instant case [R. 23], held that, by virtue of the enactment of the Mann Act, the state of Montana was precluded from enforcing a statute of that state declaring it to be unlawful to transport women from another state into Montana for the purpose of prostitution.

Subsequently, in *State v. Reed*, 53 Mont. 292 (163 Pac. 477), the court distinguished the *Harper* case, *supra*, by holding that, if the inducement and attempted transportation was complete within the state *before* interstate commerce (transportation) commenced, the state had jurisdiction to prosecute and punish. As thus distinguished by the Montana court, the *Harper* case fails to support the decision of the Appellate Department of the Superior Court in the instant case, and the case of *State v. Reed* tends to support our position.

State v. Harper, *supra* (48 Mont. 456, 138 Pac. 495) was also cited and distinguished in *In re Squires*, 114 Vt.

285, 44 Atl. 2d 13[illegible], in which the court held that, a prosecution may be had notwithstanding the federal White Slave Act under a state statute for soliciting or inducing a female to leave the state for an immoral purpose where solicitation is made or inducement offered without any step being taken toward the transportation of the female to another place.

In *Hewitt v. State*, 74 Tex. Cr. R. 46, 167 S. W. 40, it was held that a state statute penalizing the procuring or the attempt to procure a female to leave the state for the purpose of prostitution, was not in conflict with the federal White Slave Act since it did not seek to make criminal the transportation of a person from one state to another nor in any manner seek to control transportation.

Measured by the cases last cited, it appears that Section 654.1 of the California Penal Code constitutes a valid exercise of the police power of the state. However, if, as the Appellate Department of the Superior Court holds, the decision in the *Harper* case states the law with respect to such section, it follows that the same construction applies to Section 497 of the California Penal Code, which provides that persons who bring into this state property stolen in another state may be punished for theft in the same manner as if the theft had been committed in this state. If the decision of the Appellate Department in the instant case, and of the Supreme Court of Montana in the *Harper* case, be correct, it is readily manifest that Section 497 of the California Penal Code is unenforceable.

The importance of the question is accented by the fact that, in arriving at its conclusion in the instant case, the Appellate Department of the Superior Court depended, to some extent at least, upon the decision in the *Harper* case, which decision has been definitely limited by the state of

Montana in a subsequent decision, and, as applied in the instant case, is in conflict with the decisions of other jurisdictions involving substantially the same questions.

We could no doubt cite provisions of state laws with respect to narcotics which would suffer the same fate, also certain provisions of our Pure Food and Drug Acts, though in all probability, as to the Pure Food and Drug Acts, the case of *Armour v. North Dakota*, 240 U. S. 510, would probably be followed, but further illustrations are deemed unnecessary.

We deem it to be axiomatic that where, under its power of regulation, the federal government undertakes to permit under regulation the conduct of any feature of interstate commerce, the states by reason of actual or potential conflict between regulations concerning the conduct thereof, are precluded from enforcing their statutes even though no actual conflict of authority has in fact developed.

It appears equally clear that there is a distinct difference between "regulation" and "prohibition," and that when the Congress has determined that certain practices should be entirely prohibited, state laws enacted under the reserved police power, likewise punishing the commission of the same act, can be enforced. Whether this be true has never been decided by this court. Whether the state, in legislating upon matters of local concern may coincidentally aid in the effectuation of a policy of Congress to prohibit certain acts, is deprived of all power to make penal the same acts made penal by Congress solely because Congress has entered the field of legislation, is a most substantial federal question at this time when cooperation between the states and the federal government in the matter of suppression of crime is of the utmost importance.

II.

The Policy of This Court Is to Permit Jurisdiction of Both State and Federal Governments When to Do so Does Not Result in Conflict of Authority.

The decisions of this court have consistently supported exercise of the reserved police power by statutes which only incidentally or indirectly affected interstate commerce, except in cases in which exercise of authority by the state would result in conflict, actual or potential, with federal regulation or the regulation by the state would tend to prevent complete accomplishment of the policy of Congress. It can hardly be said that Congress in enacting the Federal Motor Carrier Act, intended to entirely close the field of incidental regulation to the states. In declaring and enacting such law they declared the National Transportation Policy (Act Sept. 18, 1940, Ch. 722, Title I, Sec. 1, 54 Stat. 899). Such policy includes cooperation "with the several States and the duly authorized officials thereof."

We find no case in which this court has held that Congress, by entering the field of regulation of interstate commerce by motor vehicles, intended to occupy the field to the exclusion of the states. In fact, the decisions of the court plainly indicate that such was not the intent of Congress.

So. Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177;

Mayer v. Hamilton, 309 U. S. 598, 614;

H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 85.

In *H. P. Welch Co. v. New Hampshire, supra,* this court quoted from *Illinois C. R. Co. v. State Pub. Utilities Comm.,* 245 U. S. 493, as follows:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as, its purpose to do so is clearly manifested."

In *Kelly v. Washington,* 302 U. S. 1, the court, at page 10, said:

> "This principle is well established that the exercise of the police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'."

Numerous cases in support of this statement are therein cited.

The above principle of constitutional law is well illustrated in *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148, cited by the Appellate Department of the Superior Court in support of their judgment in the case at bar. In that case the court found that the regulations of the state were inconsistent, and, at page 156, stated the rule for determining whether a state statute was invalid:

> "When the prohibition of state action is not direct, but inferable from the scope and purpose of the federal regulation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulations."

There is not, nor can there be, any inconsistency between a state statute, which does not purport to regulate the conduct of those engaged in interstate commerce except to the extent that the state law prohibits the doing of acts the performance of which is prohibited by federal law, and a federal statute which prohibits the same acts which are made penal by the state statute. To adopt a statement from the brief of defendants upon their appeal to the Appellate Department of the Superior Court: "The point at issue, however is, of course, that the federal statute and the state statute punish exactly the same act."

In *Bob-Lo Excursion Co. v. Michigan* (decided Feb. 2, 1948), ... U. S. ..... (92 L. Ed. Adv. Opinions 339) this court upheld the validity of a statute of the state of Michigan requiring equal accommodations to all citizens patronizing public conveyances in so far as such statute was applied in a limited manner to foreign commerce. The court held that the regulation by the state, under the facts of the case, contained nothing out of harmony, much less inconsistent with the federal policy in the regulation of commerce between the United States and Canada. With respect to the argument that Canada might adopt regulations in conflict with the Michigan statute, the court said that, conceding the possibility of such action, the state was right in considering such action so remote as to be hardly more than conceivable.

Section 654.1 of the California Penal Code, here under consideration, like the Michigan statute, virtually affects only residents of the state. Unlike the Michigan statute, however, the California statute is so drawn that by its express provisions, when and if the Congress undertakes to regulate casual, occasional or reciprocal carriers by providing a method whereby they may be licensed, the statute

of the state becomes of no effect with respect to authorized agents of such licensed carriers. Like the Michigan statute, the California statute "contains nothing out of harmony, much less inconsistent" with the federal policy applicable to casual, occasional or reciprocal carriers, or persons who engage in the business of selling passenger transportation for travel by means of such carriers.

The language of Mr. Justice Douglas, in a concurring opinion concerning such Michigan statute, that "This regulation would not place a burden on interstate commerce within the meaning" of the decisions of this court, is apropos to the California statute under consideration. Mr. Justice Douglas further said: "The federal policy reflected in Acts of Congress indeed bars any such discrimination (* * *) and is wholly in harmony with Michigan's law." Such language is also apropos to the statute of California under consideration if we but recognize the fact that California, in its attempt to eradicate an evil predominately local in its effect, also prohibits only that which the Congress has prohibited.

In *Hartford Accident & I. Co. v. Illinois*, 298 U. S. 155, at page 158, this court held that, statutes of a state enacted under the police power, whose effect upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress, are valid until "Congress, under the commerce power, adopts *inconsistent* legislation." (Emphasis added.)

Respondents Zook and Craig never at any time urged nor did the Appellate Department of the Superior Court find that there was an inconsistency between the state and federal laws. The contention of the defendants was at all times that, because they were punishable under the federal law, Congress has so fully occupied the field of pos-

sible legislation that the same act could not be made punishable under a statute of the state.

We see no reason for unduly extending this brief by discussing or citing additional cases except to say, lest it be thought we are urging the rule of decision herein discussed to be a recent departure from a rule previously adhered to by this court, that at least since the decision in *Nashville, Ch. & St. L. R. Co. v. Alabama*, 128 U. S. 96, this court has consistently held that, though a statute of a state may affect interstate commerce but is not strictly a regulation of such commerce, being a part of that body of local law which governs the relation between the public and carriers, such statute is not displaced until it comes in conflict with an express enactment of Congress. The case last cited was cited and distinguished, but not disapproved as late as 1945, in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, in which the court found that a statute of Arizona was found to place an undue burden upon interstate commerce. The court in such case, at page 770, stated that there has been left to the states a wide scope for regulation of matters of local concern, though it in some measure affects interstate commerce, provided it does not materially restrict the free flow of commerce across the state lines.

Thus we see that, in deciding the instant case, the Appellate Department of the Superior Court has wholly disregarded the prevailing rule of decision of this court, and thereby decided a federal question of importance contrary to the applicable decisions of this court.

As we shall demonstrate in our following point, such result was attained by applying to the facts of this case decisions of this court upon factual situations in nowise similar to those in the case at bar.

III.

The Appellate Department of the Superior Court, in Its Decision, Has Applied Decisions of This Court in a Manner Contrary to the Meaning and Effect Thereof.

As stated in our petition, the decision of the Appellate Department of the Superior Court is based upon the proposition that, when Congress has entered the field of permitted legislation the state is barred from legislating in such field, or, as stated in *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U. S. 598, cited by the Appellate Department of the Superior Court in its decision: "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition . . ." The cardinal rule of interpretation of decisions of any court is, that language used therein must be read in the light shed by the facts of the case in which such decision was rendered. Although your petitioner well recognizes the rule that briefs should be concise, we know of no method whereby we can adequately show the intent of this court, in using language such as quoted above, to limit such language to cases in which there existed either a direct or potential conflict between the state and the federal government otherwise than by briefly pointing to the nature of the various cases cited by the Appellate Department of the Superior Court in which such language is used.

New York v. Compagnie Generals Transatlantique, 17 Otto (107 U. S.) 59, involved a statute of New York,

which levied a tax of one dollar upon each alien passenger brought into the state by vessel. The statute purported to be an "inspection" statute. This court, looking through the veil of obscurity caused by the title to the Act, found it to be a law designed to raise money to support paupers, etc.

Charleston & Western Carolina R. Co. v. Varnville Furniture Co., supra (237 U. S. 597), involved a statute of South Carolina which imposed a penalty of $50.00 upon any carrier which failed to either promptly pay a claim for damages or show that the damages were occasioned by another carrier. The federal law declared the initial carrier responsible for damage occurring to shipments. It is to be noted that, in holding the South Carolina statute void, the court cited and distinguished *Missouri K. & T. R. Co. v. Harris,* 234 U. S. 412, 420, in which the court upheld the imposition of a reasonable attorney's fee if claim was sued upon and recovered in full. The court did not even intimate that the decision in the *Harris* case was incorrect. Had the language in *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.,* quoted by the Appellate Department, been intended to cover all cases in which there was coincidence only upon the matter of regulation, it is inconceivable that Mr. Justice Holmes would have cited the *Missouri K. & T.* case with evident approval.

Missouri Pac. R. Co. v. Porter, 273 U. S. 341, involved a statute of Arkansas which established liabilities upon shippers which were in direct conflict with the limitation

of liabilities established under federal law. This is a case of direct conflict.

Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, involved the power of the state of Washington to prohibit, by embargo, the shipment of alfalfa hay into that state from other states. The court found that Congress had taken over the matter of quarantine of plants, etc. It follows that matter not quarantined by order of the United States Department of Agriculture may be lawfully moved in interstate commerce. Here again we have a direct conflict between state and federal authority. In contrast, the California statute (Penal Code Sec. 654.1), involved in the instant case, presents no conflict or possibility of conflict with federal law or policy. Its primary force is upon a matter of local concern and its effect upon interstate commerce is indirect only and such effect continues only until such time as Congress provides some method whereby casual, occasional or reciprocal carriers, carrying passengers to whom transportation is sold by persons engaged in the business of selling such transportation, may lawfully operate in such manner.

In *Northern Pac. R. Co. v. Washington*, 222 U. S. 370, the question was whether, after Congress had enacted a law governing the hours of labor of railroad employees, which law was not to go in effect for one year, the state could regulate such hours of labor in the interim. Suffice it to say that, whatever may be the proper rule in this respect applicable to railroads, this court in *Welch Co. v. New Hampshire*, 306 U. S. 79, at page 85, held that, even

though the Federal Motor Carrier Act became effective, state laws governing hours of labor of truck drivers applied to interstate carriers until such time as the Interstate Commerce Commission had prescribed applicable regulations. The court stated in the *Welch* case that the purpose of Congress to displace local law must be definitely expressed, and that in construing federal statutes it should never be held that Congress intends to supersede or suspend the exercise of reserved (police) power of the states unless, and except, in so far as purpose so to do is clearly manifest.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, presented a direct conflict between the state and the federal government, in that the federal government had undertaken to determine what reprocessed butter could be shipped in interstate commerce and the state had undertaken to condemn and confiscate substances approved by the United States Agriculture Department. In contrast, in the case at bar the federal and state authorities have condemned exactly the same act and each has prescribed punishment for doing such act.

Bethlehem Steel Co. v. New York Labor Relations Board, 330 U. S. 767, involved the power of the state of New York to recognize foremen as a class for the purpose of determining bargaining rights. To analyze the decision in that case would unduly extend this brief. Suffice it to say that the court found that the National Labor Relations Board had at no time declined jurisdiction over foremen, but had held that unions of foremen were not proper

bargaining units, and held, in effect that Congress had delegated all power in respect to such matters to the National Labor Relations Board, and the determination of such Board that foremen's unions were not proper bargaining units precluded the state from recognizing such unions as bargaining units with respect to firms engaged in interstate commerce.

In *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, it appears that under federal law the Interstate Commerce Commission was authorized to prescribe safety equipment for railroad cars to be used in interstate commerce, and the state Railroad Commission was empowered to prescribe safety regulations for such cars moving within the state. The fact of potential conflict becomes obvious, in that, if the state Commission had authority to prescribe rules governing all cars moving within the state, it had power to require equipment different from that prescribed by the Interstate Commerce Commission, and the ensuing result might be the necessity of unloading and transferring freight at the state lines. The difference between such case and the case here presented, is that in the instant case the movement of interstate commerce, even though unlawful under the federal law, is not interfered with in the slightest degree by the California statute.

IV.

State Statutes, Enacted Under the Reserved Police Power, and Applicable to Local Conditions Only, Which Do Not Interfere With the Free Movement of Interstate Commerce, Are Not Void Solely by Reason of the Fact That They Indirectly Affect in Some Slight Degree an Incidental Phase of Such Commerce.

At the risk of appearing repetitious, we again point out that Section 654.1 of the California Penal Code affects interstate commerce only in an indirect manner, in that it only prohibits the sale by persons engaged in the business of transportation of passengers to be carried by persons operating in violation of federal law. It does not interfere with the movement of the person to whom transportation is sold, nor does it hinder the operation of the carrier, unlawful though his conduct may be. The act of the dealer in transportation is wholly completed within the state before transportation commences. There are transactions affecting to some slight degree interstate commerce, which, from their nature, cannot be adequately reached by any Act of Congress (*California v. Thompson*, 313 U. S. 109, 113), and the kind of transactions reached by Section 654.1 of the California Penal Code belong to such class. (See, *California v. Thompson, supra.*)

Statutes which are not directed at interstate commerce but only incidentally interfere with such commerce are not necessarily void.

Lake Shore & M. C. R. Co. v. Ohio, 173 U. S. 285, 303.

State regulation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may to some extent or under some circumstances affect such commerce.

Lake Shore & M. C. R. Co. v. Ohio, supra, p. 304.

The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concern, even though such legislation may indirectly and incidentally affect interstate commerce.

Boston & M. R. Co. v. Armburg, 285 U. S. 234, 238.

The interference with the commerce power of the federal government, to be unlawful, must be direct and not the merely incidental effect of enforcing the police power of the state.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518-519.

In conferring upon Congress the regulation of commerce it was never intended to cut the states off from legislating upon all subjects relating to the health, life and safety of its citizens, though such legislation might indirectly affect interstate commerce.

Crossman v. Lurman, 192 U. S. 189, 197.

To apply the language of the court in *Austin v. Tennessee*, 179 U. S. 343, at page 350, to the instant case, we say that though the state of California may be prohibited from entirely interdicting interstate commerce by casual, occasional or reciprocal carriers, it is not bound to furnish a market for persons engaged in selling transportation for carriage by such carriers, operating in violation of federal statutes.

In the instant case we find the Messrs. Zook and Craig in effect saying that because the Congress has said that their acts are punishable under federal statutes, the State of California is required to furnish them with an opportunity to engage in such unlawful practice until such time as federal authority compels them to withdraw therefrom.

In *Panhandle E. Pipe Line Co. v. Public Service Com.* (decided December 15, 1947), ... U. S. ....., the court, in speaking of the federal statute involved in such case, said:

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption."

It may be urged by the respondents to this brief that the Congress definitely indicated an intent to permit limited regulation by the states. To such argument we reply that, by its statement in the declaration of the National Policy (54 Stats. 877, Ch 722, Title I, Sec. 1), which declared cooperation with the various states and the officials thereof to be an element of such policy, Congress indicated an intent that state statutes, which only incidentally affected interstate commerce and tended to effectuate the common policy of the federal and state governments, should not be declared invalid merely because such state enactments related to a field of regulation into which Congress had entered.

V.

A State May Punish for Violation of a Statute of the State Even Though the Same Act Is Also Punishable Under the Provisions of a Federal Statute.

In argument in the Appellate Department of the Superior Court, in support of the point stated above, we cited certain cases which are cited by such court in its opinion. It would appear from the decision of such court that they thought there was something peculiarly sacrosant concerning regulation of interstate commerce which prevented the application of such principle of law to commerce cases.

As we view the federal Constitution, the power granted to Congress by the commerce provision differs none whatever from other powers granted the Congress, save and except a difference in subject matter. In short, whenever any power is granted to Congress such grant prevents state legislation in conflict with statutes enacted by Congress pursuant to the power granted. We concede that, if a state statute be void by reason of being in conflict with the Acts of Congress, constituting an undue burden upon interstate commerce or standing as a hindrance to the carrying out of the policy of Congress, the power of the state to punish falls with the remainder of the state statute. On the other hand, if the statute of the state is within the power of the state to enact, the fact that it punishes an act punishable under a federal law does not render the statute void. This court has consistently held, at least since *Fox v. Ohio*, 5 Howard 410, that even though an act be punishable by the federal government such fact does not prevent punishment for the same act under the provisions of a state statute enacted for the protection of the citizens of the state.

In *U. S. v. Marigold*, 9 Howard 560, the court, at page 569, approved the conclusions in *Fox v. Ohio, supra.*

In *In re Siebold* (Habeas Corpus cases), 100 U. S. (10 Otto) 371, in supporting the power of both state and federal governments to enact statutes upon the same subject matter, the court said:

> "There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same Legislature."

Thereafter, in its opinion, with respect to the contention that an officer might be made liable to two penalties, the court said that where a person owes a duty to two sovereigns either may hold him to account.

The same rule was followed in *Cross v. North Carolina*, 132 U. S. 131.

The Appellate Department of the Superior Court, in its decisions, points to that in *Southern R. Co. v. Railroad Com.*, 236 U. S. 439, the *Cross* case was held to be inapplicable. However, it must be noted that in the *Southern R. Co.* case the court explained in detail the reason why the rule in the *Cross* case was not applicable in that particular case. Again, in *U. S. v. Lanza*, 250 U. S. 377, this court delineated the application of the principal of responsibility to the laws of two jurisdictions. Inclusion herein of quotations from such cases, explaining under what circumstances the principle of law under consideration did and did not apply, would unduly extend this brief.

Briefly, the rule of application is that, if the state statute which prescribes punishment is wholly void because of conflict, actual or potential, with a federal law

upon the same subject matter, the power to punish falls with the statute.

In no case has this court held that, the fact that because a state statute provides punishment for an act punishable under federal law, the state enactment is void. In other words, in every case in which the question arose, this court has supported the right of the state to punish under any state statute within the field of permissive state legislation.

VI.

Commerce Carried on in Violation of Federal Statutes Is Not in Its True Sense a Proper Subject of Interstate Commerce, and Such Unlawful Commerce Is Not Within the Limitation Imposed Upon the States in Legislating Upon Interstate Commerce.

In *Kelly v. Washington*, 302 U. S. 1, at page 15, the court said that a vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense, is not within the protection of federal laws and that the state may treat it as it may treat a diseased animal or unwholesome food.

In *Ziffrin v. Reeves*, 308 U. S. 132, the court, at page 139, said that property which, under a state statute, is subject to forfeiture, cannot be regarded as a proper article of commerce. By the same token, the transportation involved in the case at bar cannot be regarded as a proper article of commerce.

The Interstate Commerce Commission, by its order in *Ex parte No. MC 35*, 33 M. C. C. 69, declared casual, occasional or reciprocal carriers, who transport passengers to whom tickets are sold by persons engaged in the business of selling transportation, subject to all the provisions

of Part II of the Interstate Commerce Act. Thereby, the operation of such carriers without first securing authority from the Interstate Commerce Commission so to do, was prohibited under the federal law. Those who persist in operating in violation of such law, though they are entitled to all the protection afforded by the Constitution if charged with the violation of such law, are not in position to urge that because they are engaged in the physical act of transporting persons between points in separate states they are engaged in "interstate" commerce within the spirit or meaning of the federal Constitution or of federal statutes.

By the same token it follows that, persons who engage in the business of selling transportation for carriage by such carriers in violation of the provisions of the Interstate Commerce Act, Part II, Section 211 (49 U. S. C. A., Ch. 8, Sec. 311), are not engaged in such commerce within the limitations imposed upon the state, and, unless protected by some provision of the federal Constitution other than the commerce clause, their conduct is subject to the police power of the state.

It is certainly an anomalous situation to find persons, as we find them in the case at bar, standing before the court and urging that, because of the fact that they are in effect aiding carriers in their violation of federal law, and thereby themselves become subject to prosecution for violation of such law, they are thereby rendered immune from prosecution under a state statute which provides punishment when and if they sell such contraband transportation.

VII.

Conclusion.

It is submitted by your petitioner that the statute of the State of California, involved in the instant case, is well outside the limitations imposed upon the states with respect to legislating upon interstate commerce, however broad such limitations may be.

The matter is of utmost importance to the people of the State of California for the reason that, in California, probably more than in any other state, numerous persons find that for various reasons they are required to go east and are disposed to avail themselves of the opportunity to travel by so-called casual carriers. Altogether too frequently such persons are "dumped" before the carrier, by crossing the state line, thereby engages in interstate commerce.

If it is impossible for the state to eliminate the "travel bureau" which too often has no interest in anything but the remuneration coming to him from the sale of the transportation, and exercises no care in determining the responsibility of the carrier whose services are to be utilized, the loss and injury will continue unabated.

It is to be noted that the statute does not prevent casual carriers from transporting persons when the arrangement for such transportation is carried on solely by and between the carrier and the prospective passenger. Assuming that such carriers fill a public need of transportation of persons who cannot afford to pay the fare demanded by licensed carriers, such field is left open to the public so long as

they personally arrange for such transportation and therefore personally estimate the probability of improper action upon the part of the carrier.

The petition in this case should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 355

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents respectfully present this brief in opposition to the Petition of the People of the State of California for a Writ of Certiorari directed to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, to review the judgment of that Court rendered in the case entitled, "The People of the State of California vs. Berl B. Zook and Wilmer K. Craig," being case No. CR A 2380 in the records of said Court.

Reference to Opinion of the Court Below.

The said opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, involved in the instant case will be printed in the permanent official California Appellate Reports and will be cited as.....Cal. App. 2d Supp..... The permanent volume of said reports has not yet been printed and for that reason the volume and page number cannot be furnished by respondents. The decision has been printed in 87 Advance California Appellate Reports Supp. at page 780. The opinion has been printed in the record filed with this Court. [R. 19.]

Grounds of Jurisdiction.

Respondents agree that Petitioner has correctly stated the basis of the jurisdiction of this Court at page 29 of its petition and brief.

Statement of the Case.

Respondents agree with the accuracy of the statement of the case made by Petitioner at pages 29 to 33 of its brief, but disagree with Petitioner's statement of the question involved in this case.

Respondents submit that the question simply is:

May the State of California punish a person for an act which is prohibited by Federal Statute enacted under the Commerce Clause of the United States Constitution and punishable under such statute where Congress by legislation has occupied fully the field of activity concerned?

History of Legislation Involved.

Petitioner under this point at page 33 *et seq.* of its brief fairly sets forth the history of the legislation involved, save that it argumentatively and incorrectly states the effect of Section 654.1 of the California Penal Code. This statute is correctly set forth verbatim in the appendix to its petition following page 22 of its petition and brief.

The net effect of Section 654.1 of the California Penal Code is to punish criminally one who sells transportation by a casual carrier not holding a Certificate of Public Convenience and Necessity or a contract carrier's permit from the Interstate Commerce Commission, an act punishable in the Federal Courts under Federal Statute enacted pursuant to the authority conferred upon the Congress by the Commerce Clause of the United States Constitution.

Summary of Argument.

I. THE FEDERAL QUESTION IS NOT SUBSTANTIAL.

II. CONGRESS HAS FULLY OCCUPIED THE FIELD HERE IN QUESTION BY A SCHEME OF COMPREHENSIVE REGULATION, INCLUDING PENALTIES FOR THE VIOLATION THEREOF, AND NO ROOM REMAINS FOR STATE ACTION BY WAY OF PUNISHMENT OR OTHERWISE IN THE PREMISES.

III. THE AUTHORITIES CITED BY PETITIONER DO NOT SUPPORT ITS POSITION.

IV. CONCLUSION.

ARGUMENT.

I.

The Federal Question Is Not Substantial.

Petitioner's essential argument in support of its assertion that the Federal question is substantial is that the question presented is novel. Respondents believe that it is well settled, on the contrary, that where the Congress has fully occupied a particular field of interstate commerce by appropriate legislation, no place remains for the effective enactment of State legislation on the subject.

Missouri Pacific v. Porter, 273 U. S. 341, 346;

Charleston & Carolina Railway v. Varnville Furniture Co., 237 U. S. 597, 604;

Southern Railway Company v. Railroad Commission, 236 U. S. 439, 448.

The foregoing principle will be more completely discussed in the argument under the following point.

II.

Congress Has Fully Occupied the Field Here in Question by a Scheme of Comprehensive Regulation, Including Penalties for the Violation Thereof, and No Room Remains for State Action by Way of Punishment or Otherwise in the Premises.

In 1935 Congress enacted Part II of the Interstate Commerce Act, the pertinent provisions of which are set forth in the Appendix to this brief.

About 1940 the Interstate Commerce Commission, pursuant to the authority conferred upon it in Section 303(b), U. S. C. A., instituted an investigation, Ex Parte No. MC 35, to determine whether or not the exemption of casual,

occasional or reciprocal transportation of passengers or property by motor vehicle or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business should be removed.

On March 21, 1942, the Interstate Commerce Commission duly made and entered its decision and order in Ex Parte No. MC 35, 33 MCC 69, 3 Fed. Carrier Cases 202. The findings of the Commission in this case are set forth at pages 25 and 26 of Petitioner's petition and brief. In the Appendix following this brief will be found pertinent excerpts from the opinion of the Commission in that case.

The Interstate Commerce Commission's decision and order in Ex Parte MC 35, *supra*, had the force and effect of making the transportation of passengers by motor vehicle in interstate commerce for compensation subject to all the provisions of Part II of the Interstate Commerce Act, whenever and wherever such transportation is sold, offered for sale, provided, procured, furnished or arranged for by any person who sells, offers for sale, provides, furnishes, contracts or arranges for transportation and compensation or as a regular occupation or business.

The order removed the exemption theretofore existing and made all provisions of Part II of the Interstate Commerce Act applicable to the furnishing or sale of such transportation as that with which we are here concerned.

People v. Van Horn, 76 Cal. App. 2d 753.

Section 654.1 of the Penal Code of the State of California, the statute here in question, is set forth in full in the Appendix to this brief.

Part II of the Interstate Commerce Act, since the Interstate Commerce Commission made its order in Ex Parte

No. MC 35, punishes as a crime the sale of transportation over a casual motor carrier without a certificate of convenience and necessity or a permit from the Interstate Commerce Commission; Section 654.1 of the California Penal Code attempts to punish as a crime the identical act.

It will thus be observed that the California Statute punishes criminally the very acts punished criminally by the Congressional Act. Petitioner has never contended otherwise.

Petitioner has consistently ignored the well settled principle that once Congress has entered a field of interstate commerce with a comprehensive scheme of regulation, including penalties for the violation thereof, future attempts to legislate upon the same subject are invalid under the Commerce Clause of the United States Constitution.

In *Missouri Pacific v. Porter*, 273 U. S. 341 at 346, this Court said respecting a statute of the State of Arkansas prohibiting limitation of liabilities by railroads, after the enactment by the Congress of the Carmack Amendment:

> "Its (Congress') power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied *in coincidence with*, as complementary to, or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." (Italics ours.)

Mr. Justice Holmes felicitously stated the same principle in *Charleston & Western Carolina Ry. Co. v. Varnville*, 237 U. S. 597, respecting the South Carolina Act penalizing the failure of railroads to pay claims promptly, even

though the Carmack Amendment had been enacted by the Congress, at page 604:

> "When Congress has taken the particular subject matter in hand *coincidence* is as ineffective as opposition, and a State law is not declared a help because it attempts to go farther than Congress has seen fit to go. * * * The legislation is not saved by calling it an exercise of the police power. * * *" (Italics ours.)

In *Southern Railway Co. v. Railroad Commission*, 236 U. S. 439, a statute of the State of Indiana penalized as unlawful the failure to secure grab-irons upon railway cars. The Safety Appliance Act, 45 U. S. C. A., Sections 4611 and 4612, imposed penalties likewise for similar omissions. In striking down the State enactment the Court stated at page 448:

> "The test, however, is not whether the State legislature is in conflict with the details of the federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had asserted its exclusive control."

The Congress and the Interstate Commerce Commission in Part II of the Interstate Commerce Act, in Ex Parte No. MC 35, have subjected to a comprehensive scheme of regulation the licensing of sellers of transportation over casual motor carriers, and have required as incident thereto the licensing of such carriers. Appropriate criminal penalties are imposed upon one who sells transportation over an unlicensed casual motor carrier. The California State Statute in question attempts to penalize identically the same thing. It is submitted that under the authorities cited, Section 654.1 of the Penal Code of the State of California is invalid.

III.

The Authorities Cited by Petitioner Do Not Support Its Position.

Petitioner contends in its argument that this Court found in *California v. Thompson*, 313 U. S. 109, that the regulation of the instant matter was one peculiarly for State regulation. The Court made no such finding unless its conclusion that the field was an appropriate one for State regulation in the absence of Federal enactment therein be distorted to that conclusion. This Court in *California v. Thompson, supra*, held that Congress could exclude the State by fully occupying the field of legislation in question, even though in that case this Court correctly held that at the time in question Congress had not fully occupied the field. As previously shown, since the *Thompson* case arose, the Interstate Commerce Commission has extended the application of Part II of the Interstate Commerce Act to the very field here in question, and it follows that the Federal enactment now fully covers the field to the exclusion of the State legislation upon the subject.

Petitioner criticizes the citation by the Appellate Department of the Superior Court of the State of California in its opinion of *State v. Harper*, 48 Mont. 456 (138 Pac. 495), citing in support of its criticism *State v. Reid*, 53 Mont. 292 (163 Pac. 477), and *In re Squires*, 144 Vt. 285 (44 A. 2d 133), and *Hewitt v. State*, 74 Tex. Cr. 46 (167 S. W. 40). The Appellate Department of the Superior Court noted that *State v. Harper, supra*, held invalid a Montana State law substantially like the Mann Act (18 U. S. C. A., Sections 2421-2424), prohibiting the transportation of women into the State for immoral purposes. The Supreme Court of Montana in that case aptly said of the contention that the State police power ought to

extend to the punishment of the same act punished by Congress in the exercise of its power under the Commerce Clause:

> "This might be true in some instances, but here we are confronted with the fact that, so far as the regulation of interstate commerce is concerned, the States have expressly surrendered the entire subject to the general government, and that, when the general government sees fit to exercise the powers delegated and surrendered to it by the States, the State is precluded from saying that the subject, or any matter connected therewith, is under the concurrent control of the two sovereignties."

This answers Petitioner's contention that a State has power to punish where the same act is punishable under Federal Statute enacted pursuant to the Commerce Clause of the Federal Constitution.

It must be noted that the Mann Act punishes only the transportation and acts resulting and causing the actual transportation between states of a woman for immoral purposes. This fact itself distinguishes *Hewitt v. State*, 74 Tex. Cr. R. 46 (167 S. W. 40); *State v. Reid, supra*, and *In re Squires, supra*, each of these punishing not the transportation of women but the inducement of women to travel for immoral purposes. It is clear, as pointed out in *In re Squires, supra*, that had Congress acted under the Commerce Clause to punish the inducing of women to travel in interstate commerce, the State Statute would be of no force or effect and would fall. It follows that these very cases cited by Petitioner stand as authority for the principles enunciated by the Appellate Department of the Superior Court in its opinion in the instant case.

Petitioner cites *Armour & Co. v. North Dakota*, 240 U. S. 510, presumably as offering some support to contentions in the instant case. The *Armour* case actually held nothing more than that a State might prescribe the size of containers for lard moving in intrastate commerce and that Federal enactments under the Commerce Clause did not limit the right of the State so to legislate.

After conceding at page 3 of its petition and brief that the State of California here is attempting to punish the identical act punished by the Federal Government under Part II of the Interstate Commerce Act, petitioner attempts to suggest at page 44 that perhaps Congress has not occupied the field here to the exclusion of the States. It is clear that Congress has occupied this particular segment of the field of regulation of interstate motor carrier transportation. The cases cited by petitioner in support of its last mentioned subject offer petitioner no comfort.

South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U. S. 177, simply holds that since the Congress has never prescribed any limitations with respect to the width and weight of motor vehicles moving in interstate commerce, the States may validly enact legislation on the subject.

Maurer v. Hamilton, 309 U. S. 598, holds that since the Congress has not delegated authority to the Interstate Commerce Commission to regulate the mode of construction of motor vehicles moving in interstate commerce in the transportation of automobiles, the State of Pennsylvania might validly legislate concerning the construction of such vehicles.

H. P. Welch Co. v. New Hampshire, 306 U. S. 79, noted that, at the time the controversy arose, the Interstate Commerce Commission had not acted under authority previously given by Congress to regulate the hours of labor of motor carrier drivers and that, until the Interstate Commerce Commission promulgated such regulations (as it subsequently did), the State might validly legislate on the subject.

Nothing in the last three decisions quoted asserts anything other than the fact that at the particular times in question Congress or the Interstate Commerce Commission had not entered a particular segment of the field of interstate commerce and for that reason, and that alone, State statutes were valid.

In *Kelly v. Washington*, 302 U. S. 1, the Court found that the Congress had not legislated respecting the inspection of certain classes of vessels and that the State of Washington might therefore properly do so, saying at page 10: "Congress may circumscribe its regulation and occupy a limited field. When it does so, State regulation outside that limited field and otherwise admissible is not forbidden or displaced." Of course the instant case is not that case.

In *Cloverleaf Co. v. Patterson*, 315 U. S. 148, the question presented was whether State legislation *conflicted* with the Federal enactment. The Alabama Act in question contained provisions authorizing the seizure of certain spoiled butter to be renovated. No such provisions were contained in the Federal Act. Nevertheless the Court found that the State Act did conflict with the Federal Statute relating to renovating butter and held that even though the Federal Statute and State Statute did not cover identical ground, the spirit and intent of the Federal enact-

ment was that the State should not act at all in the field. Respondents do not contend that a State Statute may not be void because of conflict with Federal enactment; they do contend that a State enactment is void when it coincides with a Federal Statute. In the *Cloverleaf* case, *Charleston & Carolina Railway v. Varnville Furniture Co.*, *supra*, is quoted at page 169 of the opinion to the effect that "when Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition * * *." In the *Cloverleaf* case, as here, the State insisted that it was merely cooperating with the Federal Government, which contention this Court found invalid.

In *Bob-Lo Excursion Co. v. Mich.* (decided Feb. 2, 1948), 333 U. S. 28 (Preliminary Print), 92 L. Ed. (Advance Sheets) 339, 68 Sup. Ct. Rep. (Advance Sheets) 358, this Court noted that although the island in question was in Canadian territory, its patronage was derived almost exclusively from the City of Detroit. The instant case does not present one involving transportation between an island in that peculiar relation to an American city; it involves the sale of transportation between California and all points in the United States; specifically, the respondents sold transportation from Los Angeles, California, to Fort Worth, Texas. [R. 16.]

This Court held in the *Bob-Lo* case that an anti-discrimination statute of the State of Michigan might be enforced against a water carrier engaged in transporting passengers between the Canadian island mentioned and Michigan. It noted that the Congress had enacted no legislation in the field and consequently had not entered the field. That case obviously therefore is not the instant case.

In *Hartford Indemnity Co. v. Illinois*, 298 U. S. 115, both the State and Federal Governments required licenses

of commission merchants. The State Act required the merchants to post a bond, a requirement not present in the Federal Act. The Federal Statute by its very terms expressly validated State statutes not inconsistent or repugnant thereto. The bond provision was held to be not inconsistent or repugnant. In the instant case no such saving clause appears in the Federal enactment.

In *Nashville Ch. & St. L. R. Co. v. Ala.*, 128 U. S. 96, the State Statute in question required railway employees to pass a test for color blindness. This Court held the State Statute valid since there had been no Congressional action in the field although this Court noted that Congress' power is plenary.

In *Sou. Pac. Co. v. Ariz.*, 325 U. S. 761, the validity of an Arizona Statute limiting the number of cars for trains was questioned. After stating that at the time the case arose the Interstate Commerce Commission had not acted administratively pursuant to authority theretofore granted by Congress to prescribe the length of trains and that in consequence the Federal Congress had not occupied the field, the Court nevertheless found the statute unconstitutional because it was an unreasonable burden upon interstate commerce and consequently actually violated the Commerce Clause of the Federal Constitution. It is submitted that this is not the instant case, although it illustrates one of the grounds for declaring unconstitutional a State Statute.

Respondents conclude from the foregoing that the Appellate Department of the Superior Court has followed precisely the prevailing rule of decision in this Court.

While *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, involved the regulation of immigration, the

Court, in striking down a New York Statute, commented at page 63 that the Federal law "covers the same ground as the New York Statute and they cannot co-exist."

In *Mo., K. & T. R. Co. v. Harris*, 234 U. S. 412, this Court clearly recognized the familiar principle heretofore discussed and upon which the Appellate Department of the Superior Court based its decision; this Court said at page 417:

> "It is of course settled that when Congress has asserted its paramount legislative authority over a particular subject of interstate commerce, State laws upon the same subject are superseded."

The cases did hold valid a State Statute permitting the recovery of attorney's fees as an incident to the collection of small claims asserted against carriers in interstate commerce. But this was squarely predicated upon the conclusion that Congress had not legislated upon the subject and that therefore the State might properly do so. This Court said at page 422:

> "* * * it (the local statute) deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak the State may enforce it in such a case as the present."

As noted hereinbefore, *Charleston & Carolina R. Co. v. Varnville Co.*, 237 U. S. 597, and *Missouri Pac. v. Porter*, 273 U. S. 341, both held that coincidence between State and Federal Statutes enacted under the commerce power is as fatal as conflict.

In discussing *Ore. Wash. RR. & Nav. Co. v. Washington*, 270 U. S. 87, Petitioner reasserts its persistent contention that only conflict with Federal enactment may in-

validate a State Statute. The case actually turned on this Court's conclusion that the Federal Quarantine Acts fully occupied the field and that it followed (page 102) "* * * when Congress has acted and occupied the field as it has here, the power of States to act is prevented or suspended."

Northern Pac. R.R. Co. v. Washington, 222 U. S. 370, is not overruled by *Welch Co. v. New Hampshire*, 306 U. S. 79, even by implication. In the *Northern Pacific* case the Court found that it was Congress' intent to occupy the field fully even prior to the effective date of its legislation; the *Welch* case, as previously noted, held simply that until Federal regulation entered the field, the State legislation was valid.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, has been previously discussed as has *Southern R. Co. v. Railroad Commission*, 236 U. S. 439.

Bethlehem Steel Co. v. N. Y. Labor Relations Board, 330 U. S. 767, was unquestionably cited by the Appellate Department of the Superior Court for the general principle that when Congressional legislation had occupied a given field, no room remained for State enactment upon the same subject.

It seems clear from the foregoing that the decisions of this Court upon which the Appellate Department of the Superior Court predicated its decision accord with the result reached by the Appellate Department.

So far as research on the part of counsel for respondents discloses, the cases of this Court holding valid State legislation as having merely an incidental effect upon interstate commerce are uniformly cases where the Congress has not legislated comprehensively upon a particular segment of interstate commerce, and for that reason the States may

validly legislate in the absence of some serious burden upon interstate commerce directly contravening the Commerce Clause of the United States Constitution itself.

The cases cited by Petitioner do not alter this conclusion.

California v. Thompson, 313 U. S. 109, has been shown to involve a situation where Congress had not entered the field.

Lake Shore & M. C. R. Co. v. Ohio, 173 U. S. 285, held that a State may validly enact legislation compelling railroad trains to stop in certain towns under certain conditions in the absence of Congressional action on the subject.

Boston & M. R. Co. v. Amburg, 285 U. S. 234, held that the Massachusetts Workmen's Compensation Act applied by its terms only to intrastate commerce, and that in consequence it was not superseded by the Federal Employers Liability Act.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, involved a Kentucky Statute penalizing the collection of greater rates for a shorter haul; this Court held that the statute in question was applicable only to intrastate commerce.

This Court held in *Crossman v. Lurman*, 192 U. S. 189, that the State of New York might validly condemn adulterated coffee beans imported into that State, since the Congressional Act on the subject did not embrace the particular field.

In *Austin v. Tennessee*, 179 U. S. 343, an anti-cigarette statute of a State was held valid, since under the facts the cigarettes had come to rest within the State, and were no longer in interstate commerce, this Court striking down an attempt to invoke the original package doctrine by shipping the cigarettes in boxes containing ten cigarettes each.

In *Panhandle E. Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507 (Preliminary Print), the Congressional Statute in question expressly excluded from its operation the field in which the State legislation operated.

In *Fox v. Ohio*, 46 U. S. 410, it was held that the State might punish the uttering of counterfeit money; it was noted that the Congressional Act did not punish such uttering. In *U. S. v. Marigold*, 50 U. S. 560, this Court held that the Congressional power extended under the Money Clause of the Constitution to punishing the uttering of counterfeit money.

It was noted in *In re Siebold*, 100 U. S. 371, that State regulation of the election of United States representatives and senators was proper, although it was noted that Congress' power in the premises was paramount when, as and if it acted and that any Congressional legislation on the subject would supersede State legislation.

Cross v. North Carolina, 132 U. S. 131, was expressly distinguished in *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, at page 445, where this Court said:

> "In support of this position numerous cases are cited which, like *Cross v. North Carolina*, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respec-

tirely within the sphere of state and Federal regulation and thus violates the laws of both; or, where there is this double effect in a matter of which one can exercise control but an authoritive declaration that the paramount jurisdiction of one shall not exclude that of the other. . . ."

The Court then said at page 446:

"But the principle that the offender may, for one act, be prosecuted in two jurisdiction, has no application where one of the governments has exclusive jurisdiction of the subject-matter, and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field, the states could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the constitution the nature of that power is such that, when exercised, it is exclusive, and *ipso facto* supersedes existing state legislation on the same subject."

U. S. v. Lanza, 250 U. S. 377, held that both the State and Federal Governments could punish persons for dealing in liquor. The Eighteenth Amendment, of course, gave the State and the Federal Governments concurrent power to punish.

The plain fact is that Congressional power to legislate comprehensively on any field of interstate commerce and

to prescribe appropriate sanctions in connection therewith is paramount; when Congress so acts, a State cannot validly legislate in the same field.

Ziffrin v. Reeves, 308 U. S. 132, found valid State Legislation restricting the transportation of liquor in Kentucky to common carriers by motor vehicle. The decision was predicated upon the fact that the Twenty-first Amendment permits State regulation of liquor traffic without regard to the Commerce Clause.

IV.

Conclusion.

Congress has fully occupied the field, including in its legislation appropriate punishments in the Federal Courts for the very offense here made punishable in the State Courts of California. It is submitted under the Commerce Clause the State Statute is valid; that the Appellate Department of the Superior Court correctly decided the case, and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANK W. WOODHEAD,

Attorney for Respondents.

APPENDIX TO RESPONDENTS' BRIEF.

Relevant portions of Part II of the Interstate Commerce Act (numbering of sections is from 49 U. S. Code Annotated and the italics are ours):

"The provisions of this Part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce *and to the procurement of* and the provision of facilities for such transportation, and the regulation of such transportation, *and of the procurement thereof*, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission." (Sec. 302(a).)

"Nothing in this part, * * * shall be construed to include * * * (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, * * * apply to: * * *; or (9) the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by broker, or by any other person who sells or offers for sale transportation furnished by persons lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit." (Sec. 303(b).)

"The term 'interstate commerce' means commerce between any place in a state and any place in another state * * *." (Sec. 303(a)(10).)

"The term 'Commission' means the Interstate Commerce Commission." (Sec. 303(a)(3).)

"The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." (Sec. 303(a)(16).)

"The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for or holds himself or itself out by solicitation, advertisements or otherwise, as one who sells, provides, furnishes, contracts or arranges for such transportation." (Sec. 303(a)(18).)

"No person shall for compensation, sell or offer for sale transportation *subject to this part* or shall make any contract, agreement or arrangement to provide, procure, furnish or arrange for such transportation, or shall hold himself or itself out by advertisements, solicitation or otherwise, as one who sells, provides, procures, contracts or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: * * *. In the execution of any contract, agreement or arrangement to sell, provide, procure, furnish or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or which is not the lawful holder of an effective certificate or permit issued as provided in this part: * * *." (Sec. 311(a).)

"Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement or order thereunder, * * *, for which a penalty is not otherwise herein provided, shall upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense." (Sec. 322(a).)

"If any * * * broker operates in violation of any provision of this part * * *, or any rule, regulation, requirement or order thereunder * * *, the Commission or its duly authorized agent may apply to the District Court of the United States for any district where such * * * broker operates, for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such * * * broker, his or its officers, agents, employees and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term or condition, and enjoining upon it or them obedience thereto." (Sec. 322(b).)

Excerpt from Ex Parte No. MC 35, 3 Federal Carrier Cases 202:

"Since prior to the passage of Part II of the Act, persons have been traveling between points in the United States under the so-called 'share expense' arrangements in automobiles operated by persons not authorized either by the Commission or State regulatory bodies to transport passengers as motor common or contract carriers. The 'share expense' plan purports to be an arrangement whereby an automobile

operator traveling primarily for some purpose other than that of transporting passengers for compensation, carries passengers who share with him the expense of operation of the vehicle used. Such operators ostensibly engage in such transportation only casually or occasionally or under reciprocal arrangements. In connection with this type of travel, there has developed a business known as that of a travel bureau. Numerous individuals or partnerships operating under trade names, usually including the words 'Travel Bureau,' are engaged in this business whereby, for compensation, they bring together such automobile operators and prospective passengers and arrange, or enable such operators and passengers to arrange for travel in this manner. For this service fees or commissions are collected from either the automobile operator or the passenger, and in some cases from both.

"* * * The travel bureau business is quite extensive in many cities, particularly, those in the western and southwestern states, notably at Kansas City, Mo., Wichita, Kans., Oklahoma City and Tulsa, Okla., Dallas, Ft. Worth, San Antonio, Houston and El Paso, Tex., Los Angeles and San Francisco, Calif., Portland, Oreg., Seattle, Wash., and Denver, Colo.

* * *

"The Commission, Division 5, has held in several proceedings that the partial exemption in Section 203(b)(9) of the act of the casual, occasional and reciprocal transportation of passengers not performed as a regular business has the effect of exempting from all provisions of the act those who make a busi-

ness of arranging this type of transportation exclusively, and has denied licenses as brokers to applicants seeking authority to arrange for such transportation.

"* * * Under the present exemption, the Commission cannot fully regulate such transportation to the end that travelers are adequately protected or require travel bureaus arranging such transportation to provide financial responsibility by filing a bond or other security such as required from brokers arranging for transportation by motor carriers operating under certificates or permits. * * * We find that in order to carry out the national transportation policy declared in the act, the exemption of casual, occasional or reciprocal transportation of passengers by motor vehicle in interstate or foreign commerce for compensation as provided in Section 203(b)(9) of the act should be removed to the extent necessary so as to make applicable all provisions of the Act to such transportation when sold, offered for sale, provided, procured, furnished or arranged for by any person who sells, offers for sale, provides, furnishes, contracts or arranges for such transportation for compensation or as a regular occupation or business."

Section 654.1 of the California Penal Code provides:

"It shall be unlawful for any person, acting individually or as an officer or employee of a corporation, or as a member of a copartnership or as a commission agent or employee of another person, firm, or corporation, to sell or offer for sale, or to negotiate, provide or arrange for, or to advertise or hold himself out as

one who sells or offers for sale or negotiates, provides or arranges for transportation of a person or persons on an individual fare basis over the public highways of the State of California unless such transportation is to be furnished or provided solely by, and such sale is authorized by, a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission of the United States, authorizing the holder of such certificate or permit to provide such transportation."

Service of the within and receipt of a copy thereof is hereby admitted this.....day of November, A. D. 1948.

11-9-48—60

IN THE

Supreme Court of the United States

October Term, 1948.
No. 355

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG,
Respondents.

RESPONDENTS' MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING.

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SUBJECT INDEX

STATUTES

IN THE

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October Term, 1948.

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG,

Respondents.

RESPONDENTS' MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Respondents respectfully move this Honorable Court for leave to file their petition for rehearing in the above entitled matter.

That respondents were absent from the City of Los Angeles at the time of the rendition of the decision in the above matter April 25, 1949, but counsel for respondents immediately informed business associates of respondents of the decision and requested prompt advice respecting their decision to file a petition for rehearing.

That counsel for respondents was not advised until May 12, 1949, that respondents desired to petition for a rehearing and by reason thereof counsel was unable to ask for an extension of time within which to file said petition.

That counsel is informed that respondents and their said business associates through inadvertence and mistake failed to advise counsel of their said decision until said date by reason of their mistakenly believing that more than 15 days were available for the filing of such a petition.

That it is respectfully urged that, in the interests of justice, respondents should be permitted to file their petition for rehearing.

That respondents respectfully pray that this Honorable Court make its order permitting them to file the following petition for rehearing.

Respectfully submitted,

DEWITT MORGAN MANNING,
Attorney for Respondents.

IN THE

Supreme Court of the United States

October Term, 1948.

No. 355

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

BERL B. ZOOK and WILMER K. CRAIG,

Respondents.

PETITION FOR REHEARING.

That respondents, BERL B. ZOOK and WILMER K. CRAIG, respectfully petition for a rehearing in this Honorable Court upon the following grounds, to wit:

I.

The majority of the Court erred in its statement of the applicable law in the case in that the decision of the Court held that double punishment, *i. e.*, punishment by both the State of California and the Federal Government, is permissible.

II.

The majority of the Court erred in its statement of the applicable law in the case in that the decision of the Court held that State action did not conflict with Federal action.

III.

The majority of the Court erred in its statement of the applicable law in the case in that the decision of the Court held that Congress did not intend to preempt the whole field of interstate commerce in question.

ARGUMENT

I.

The Majority of the Court Erred in Its Statement of the Applicable Law in the Case in That the Decision of the Court Held That Double Punishment, i. e., Punishment by Both the State of California and the Federal Government, Is Permissible.

The majority opinion concedes that the possibility of double punishment is an important factor to be considered. While double punishment in some instances may be constitutionally perimissible, the imposition of double punishment for the same offense is increasingly abhorrent as an invasion of civil liberties. This Court has consequently been reluctant ever to find Congressional intent to impose double punishment.

Jerome v. United States, 318 U. S. 101, 105.

In the face of this, to find Congressional intent to share its jurisdiction with the State of California is, in the words of Mr. Justice Frankfurter immediately preceding the foregoing point, "a strained and strange way of interpreting the mind of Congress." (Opinion of Mr. Justice Frankfurter, 2.)

II.

The Majority of the Court Erred in Its Statement of the Applicable Law in the Case in That the Decision of the Court Held That State Action Did Not Conflict With Federal Action.

Mr. Justice Murphy for the majority of the Court asserts that there is no conflict between the provisions of the Federal and California statutes (Majority Opinion, 10). Mr. Justice Frankfurter, in his dissent, points out an important conflict in the matter of penalties. The California statute imposes a fine of not over $250.00 or imprisonment for not over 90 days, or both, for the first offense (California Penal Code Section 654.3). The Federal statute imposes a fine of not more than $100.00 for the first offense (49 U. S. C. A. Section 322(a)).

It was stated in *Southern Railway Co. v. Railroad Commission*, 236 U. S. 439, at page 446, "The States thereafter could not legislate so as to require greater or less or different equipment; *nor could they punish by imposing greater or less or different penalties.* . . . ." (Italics ours.)

The majority opinion attempts to distinguish the *Southern Railway Co.* case upon the ground that it was concerned with the "time honored I. C. C. control over the railroads" (Majority Opinion, 12). This attempted distinction ignores the fact that the I. C. C. has been charged equally with control over the motor carriers of the nation in the National Transportation Policy declared at the very

beginning of that portion of the Interstate Commerce Act here involved (49 U. S. C. A. immediately preceding Section 301).

Other conflicts between the California statute and the Federal statute are ingeniously set forth in Appendix C of the dissenting opinion of Mr. Justice Burton (dissent of Mr. Justice Burton, 45-50). Thus, the statutory text of the respective statutes conflicts. The California Act penalizes one arranging transportation over the lines of a carrier uncertificated by the I. C. C.; the Federal Act penalizes the same act as the State statute, and further penalizes the failure of the one arranging for the transportation to obtain a broker's license. Different exemptions are provided. Thus, in the Federal Act certified or permitted carriers and their employees and agents are exempted. Except with respect to hours of service of employees and safety standards, the transportation of school children, taxicab transportation, hotel transportation, national park vehicles, agricultural commodities transported by motor vehicles by any farmer, cooperative associations' vehicles, vehicles transporting agricultural commodities, and transportation within a municipality, are exempted by the Federal Act. On the other hand, Section 654.2 of the Penal Code exempts persons arranging transportation over uncertificated carriers where no compensation is paid, where the transportation is to or from work of employees engaged in farm work on a farm owned by the State of California, where the transportation is furnished employees of non-profit cooperative associations organized

under the laws of the State of California, where the transportation is within the limits of a single municipality, where the transportation is within a national park, and where the owner of a vehicle makes arrangements to transport persons to and from work while he himself is going to and from work. Mr. Justice Burton further points out in Appendix C to his opinion the mutual exclusiveness of the State and Federal regulations assigning intrastate regulations to the State and interstate regulations to the I. C. C., upon its finding it necessary.

If, therefore, conflict is the test, it is submitted that conflict here is clear. The difference in penalties alone brings the instant case within the interdiction of the rule laid down in the *Southern Railway Co.* case, *supra*. The majority opinion concedes that both Federal and State enactments punish exactly the same thing (Opinion of Mr. Justice Murphy, 4, 5).

If, therefore, as hereinbefore shown, and as elaborately developed in the dissent of Mr. Justice Burton, conflict does exist, then under the very rule enunciated in the majority opinion, the judgment of the Appellate Department of the Los Angeles Superior Court should be affirmed.

III.

The Majority of the Court Erred in Its Statement of the Applicable Law in the Case in That the Decision of the Court Held That Congress Did Not Intend to Preempt the Whole Field of Interstate Commerce in Question.

Predicated upon the asserted lack of conflict between the Federal and State statutes, upon the asserted absence of State regulation at the time Congress and the Interstate Commerce Commission acted, and upon the asserted shortage of Interstate Commerce Commission enforcement personnel (Opinion of Mr. Justice Murphy, 10, 11), the majority opinion discerns an intention of Congress to permit State action in the field, even though the Congressional Act and the Interstate Commerce Commission's administrative action in M. C. 35 had fully covered that field. The existence of real conflict has been shown in respondents' argument under the previous point.

With respect to the existence of State regulation, the State of California beginning in 1931 through 1946 evidenced an intention to regulate travel bureaus only until the Federal Government should act in the field.

California Statutes of 1931, Chapter 638, pages 1362, *et seq.*;

California Statutes of 1933, Chapter 390, page 1012;

California v. Thompson, 313 U. S. 109;

People of the State of California v. Edmondson, Los Angeles County Superior Court, Appellate Department, Cal. App. 2100; cert. denied 329 U. S. 716;

People v. Van Horn, 76 Cal. App. 2d 753.

It is, therefore, clear that when the Motor Carrier Act of 1935 was enacted by the Congress, as Part 2 of the Interstate Commerce Act, and when the investigations leading to the issuance of the decision and order of the Interstate Commerce Commission in *Ex parte* M. C. 35, were held, and when the decision itself was issued in 1942, the Congress and the Commission were confronted with California legislation regulating the very subject involved, but which avowedly by its terms was to terminate so far as regulation of any interstate commerce was concerned upon the entry of Congress through the administrative action of the Interstate Commerce Commission into the field. Then, surely, it was the intention of the Congress and the Interstate Commerce Commission to terminate that control and regulation of the State of California when M. C. 35 was promulgated, because under the very reasoning of the majority opinion the Congress and the Interstate Commerce Commission knew that the State regulation of California would terminate upon the entry of Federal regulation in the field.

What has just been said answers the statement in the majority opinion (p. 11) that "Since the I. C. C. order was issued after *California v. Thompson*, one would expect the federal agency to be specific if it intended to supersede state laws." What need to be specific when the I. C. C. knew that the California legislation would terminate by its own provisions?

Mr. Justice Burton, at page 26 of his dissent, quotes the opinion in M. C. 36 to the effect "that State and local officials are unable properly to regulate such operations because of the fact that a large proportion of the transportation is interstate." The specific intention

of the Interstate Commerce Commission to undertake the policing of a situation it found beyond the capabilities of State officials indicates clearly an intention not to share jurisdiction with the State of California. The argument from the asserted fact that the Interstate Commerce Commission lacks or did lack sufficient enforcement personnel that Congress intended to share its jurisdiction in this case with the State of California reduces itself to absurdity upon examination. If, in any report of the Director of the Mint, complaint be made of lack of personnel, can we then infer a Congressional intent to permit the States to coin money? If the Secretary of State reports a shortage of diplomatic personnel, may the States then send Ambassadors to foreign countries? If the National Labor Relations Board reports a shortage of personnel, may the States create administrative board to regulate the relations of labor and management, contrary to what was held in *Bethlehem Steel Co. v. State Board*, 330 U. S. 767, 775?

Thus, it appears that since there is conflict between the Federal and State statutes, since there was State legislation which was superseded by the Interstate Commerce Commission's action, and since the Interstate Commerce Commission itself discerned a problem incapable of solution by State action, the intention of Congress was not to share its jurisdiction with the State of California.

The majority opinion criticizes respondents' contention that coincidence is as fatal as conflict, insisting that such a theory would eliminate the rights of the States to legislate respecting the payment of obligations by dealers in perishable commodities, or to punish extortion or robbery from interstate commerce, or to punish the wrecking of a bridge over interstate commerce, or to transmit a ran-

som note in interstate commerce (opinion of Mr. Justice Murphy, 7). Certainly, fields of criminal activity may well be within the exclusive purview of Federal statute, and State action in the premises may be forbidden. *Cf. State v. Harper*, 48 Mont. 456, 138 Pac. 495, and *In re Squires*, 144 Vt. 285, 44 A. 2d 133.

However, the real answer to this suggestion in the majority opinion, as well as the answer to the citation by Mr. Justice Murphy of *Ex parte Siebold*, 100 U. S. 371, 390; *Fox v. Ohio*, 5 How. 410, and *United States v. Marigold*, 9 How. 560, is to be found in *Southern Railway Company v. Railroad Commission*, 236 U. S. 439, at page 445, where the court said:

> "In support of this position numerous cases are cited which, like *Cross v. North Carolina*, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and Federal regulation and thus violates the laws of both; or, where there is this double effect in a matter of which one can exercise control but an authoritive declaration that the paramount jurisdiction of one shall not exclude that of the other . . ."

The *Cross* case was predicted squarely upon *Ex parte Siebold*, *supra*; *Fox v. Ohio*, *supra*, and *United States v. Marigold*, *supra*.

In the instant case not only is the authoritive declaration of Congress' intention to share its jurisdiction with the State of California completely lacking, but the majority opinion injects the novel requirement that the declaration of an intention to exclude the States must be specific (opinion of Mr. Justice Murphy; 11). The majority opinion cites four cases in support of this point:

1. *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, noted that at the time the controversy arose the I. C. C. had not acted under authority previously given by Congress to regulate the hours of labor of motor carrier drivers and that, until the Interstate Commerce Commission promulgated such regulations (as it subsequently did), the State might validly legislate on the subject;

2. *Mauser v. Hamilton*, 309 U. S. 598, held that since the Congress had not delegated authority to the I. C. C. to regulate the mode of construction of motor vehicles moving in interstate commerce in the transportation of automobiles, the State of Pennsylvania may validly legislate concerning the construction of such vehicles;

3. *Kelly v. Washington*, 302 U. S. 1; there the Court found that the Congress had not legislated respecting the inspection of certain classes of vessels and that the State of Washington might, therefore, properly do so saying at page 10, "Congress may circumscribe its regulation and occupy a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced;

4. *Mintz v. Baldwin*, 289 U. S. 346; this case also held that Congress had not completely occupied the field, and that there remained a sphere for State action. That circumstance alone distinguishes this case where the field has been fully occupied by Congress and administrative action by the Interstate Commerce Commission pursuant to Congressional authority.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, is also cited for the proposition that the Federal provisions must be inconsistent with those of the State to justify striking down the State legislation. It must be recalled that although the Alabama statute in question occupied a segment of the field different from that occupied by the Federal legislation, the Court found the State legislation inconsistent with the spirit and intent of the Federal legislation and, therefore, invalid; the instant case, of course, goes a step farther—here State and Federal legislation coincide and, as hereinafter pointed out, that very circumstance has heretofore led the Court to the conclusion that Congress did not intend to share its jurisdiction.

The majority opinion also cites *Hines v. Davidowitz*, 312 U. S. 52, for the same principle; it may be noted that the State legislation in that case was struck down as unconstitutional, the Court citing *People v. Compagnie G. T.*, 107 U. S. 59, at page 63, to the effect that the Federal law "covers the same ground as the New York statute, and they cannot co-exist."

Of course, where Congress has not legislated on the precise segment of the field covered by the State action, the Court must seek a clear manifestation of a congressional purpose to displace local laws. Such a case is *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148. Al-

though the Alabama Act there in question contained provisions which covered ground other than that covered by the Federal statute, this Court nevertheless held that the spirit and intent of the Federal enactment was that the State should not act at all in the field. Certainly the Federal statute in the *Cloverleaf* case did not by terms exclude State action; it did not even cover the same segment of the field of regulation as that covered by the State statute. Yet, in the instant case, where Congress has acted in the very matter covered by the State statute, the majority opinion insists that specific Congressional intent to exclude State action must appear. It is submitted that on the contrary there must be found the clearest evidence of Congressional intention to share its jurisdiction in a case like this; indeed, before considering the validity of State legislation under the circumstances here existing, the expression in so many words by Congress of its intention to share its jurisdiction should be required. *Cf. Panhandle E. Pipeline Co. v. Public Service Commission of Indiana*, 332 U. S. 507. (Preliminary Print.)

In those cases where this Court has found that Congress has entered the field completely under the Commerce Clause, as here, this Court has almost uniformly stricken down coincident State legislation, where there is no express declaration by Congress of its intention to share its jurisdiction.

Prigg v. Pennsylvania, 41 U. S. 539, 617;

Charleston & Carolina Railway v. Varnville Furniture Co., 237 U. S. 597;

Southern Railway Co. v. Railroad Commission, 236 U. S. 439, 448;

Bethlehem Steel Co. v. State Board, 330 U. S. 767, 775;

People v. Compagnie G. T., 107 U. S. 59, 63.

If respondents are mistaken in asserting that coincidence is as fatal as conflict, then it is respectfully urged that respondents are correct in asserting that where coincidence exists under the Commerce Clause, it is the intention of Congress that the Federal enactment supersedes the State enactment in the absence of an express declaration by Congress of its willingness that State legislation on the precise subject co-exist.

Nothing in *Asbell v. Kansas*, 207 U. S. 251, conflicts with the principle announced in the last cited cases. The *Asbell* case clearly recognizes the principle contended for by respondents, at page 256, where the Court, by Mr. Justice Moody, stated:

> "Tested by these principles, the statute before us is an inspection law and nothing else, it excludes only cattle found to be deceased, and *in the absence of controlling legislation by Congress* it is clearly within the authority of the State . . . ." (Italics ours.)

The *Asbell* case clearly turned on the fact that there had been no administrative action by the Secretary of Agriculture which brought the Federal legislation into the particular segment of the field in question covered by the State legislation. The Court said, at page 258:

> "Rule 13 issued by the Secretary of Agriculture under the authority of the statute is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined states, which is not this case, and that in terms it recognizes restrictions imposed by the state of destination."

Subsequent cases emphasize the validity of this distinction between the *Asbell* case and the instant case.

Oregon-Washington Co. v. Washington, 270 U. S. 87, 95;

Must Hatch Incubator Co. v. Patterson, 27 F. 2d 447, 449;

Mintz v. Baldwin, 289 U. S. 346, 351, 352.

Conclusion.

It is respectfully submitted that in occupying the instant field Congress did not intend to share its jurisdiction with the State of California, because:

1. No express Congressional intent to impose double punishment can be found here;

2. Conflict exists between the terms of the Federal statute and the California statute with respect to punishment, acts covered, exemptions, and purposes;

3. The Interstate Commerce Commission acted avowedly to control a difficulty which the Commission found incapable of solution by the State authorities;

4. The Congress and the I. C. C. knew that occupation of the field by Interstate Commerce Commission orders would cause the then existing California legislation to fall by its own terms with respect to interstate commerce;

5. Historically the complete occupation of a particular field of activity in interstate commerce by Congressional action has led this Court to the conclusion that the Congress intended that its jurisdiction should be exclusive, a circumstance which Con-

gress may be presumed to have considered in enacting the instant legislation and which the I. C. C. may be presumed to have considered in promulgating. *Ex parte* M. C. 35.

For the reasons given, it is respectfully urged that a rehearing should be granted in the instant matter, and that upon such rehearing the judgment of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles should be affirmed.

Respectfully submitted,

DEWITT MORGAN MANNING,
Attorney for Respondents.

Certificate of Counsel.

DeWitt Morgan Manning, counsel for respondents herein, hereby certifies that the foregoing petition is presented in good faith and not for delay, and that the petition for rehearing is restricted to grounds arising by reason of said opinion and matters therein set forth.

DEWITT MORGAN MANNING,
Attorney for Respondents.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A. D. 1949.

5-16-49—60